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Globalization, Interlegality and Europeanized Contract Law

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I. Introduction: Globalization, Interlegality and the Communication on European Contract law

The initiatives in regional integration taken by the European Community (EC) have played a major role in indicating the type of innovative cooperation necessary given the increasing obsolescence of the nation-state as the basic unit of international life in today's global trading environment. Though the Mercosur, NAFTA and ASEAN represent weaker forms of regional cooperation, the logic of the path followed by the EC implies that these organizations will eventually be forced to resort to more advanced forms of policy harmonization in order to meet the challenges of globalization. While efforts at regional cooperation have traditionally concentrated on freeing the factors of production, the perception has grown that securing free trade areas, customs unions, or common markets are only the first steps of integration and that ever-broader coordination is required. These efforts at regional cooperation in turn will lead to a far greater need for more enhanced global policy coordination.

Given the traditional focus on the factors of production, it is not surprising that the more general role of private law in regional cooperation models has been either ignored or obscured. Increasingly, however, the realization has grown that differences in national private law and the difficulties associated with the coordination of national, regional and international legal norms can fragment markets, and compromise efficiency, competition, and growth in the same way as the more visible provisions of discriminatory trade law. It is in this context that the European Commission's Communication on European Contract law[1] initiates debate. The Communication, which presents options for

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1. COM (2001) 398 final, Communication from the Commission to the Council and

the future of the law of Contract in the EC, focuses attention on the way in which national law has been shaped by a process of "Europeanization" and the market fragmenting aspect of the divergence between national, EC and international contract law. In focusing on these issues, the Communication exposes the practical and theoretical problems for cross-border contracting, which are of significance not only for the EC, but also serve as an innovative model for other regional organizations.

The new emphasis set by the Communication on the need to harmonize the private norms of Contract law is conditioned by the recognition that, in the global marketplace, the contents of contracts are no longer controlled simply by national law but are shaped by the interplay of national, international and regional norms. This trend towards 'Europeanized' and 'internationalized' transactions has been all the more pronounced in the EC, a Community of 15 Member States and 16 jurisdictions, with the advent of "e-commerce" and the price transparency brought about by the introduction of the EURO. Further exacerbating fragmentation, as Lurger observes, a feature of recent national law-making in Civil law jurisdictions has been the passing of increasingly specific laws, especially in consumer protection, outside the general codified law of contract.[2] These developments have underscored the fragmented plurality of norms, which confront the legal community with problems in distilling the law relevant to a contract and coordinating the diverse legal sources.

From the theoretical perspective, the problem is that we are faced with a new malleability of legal norms. As de Sousa Santos has put it, the idea of a monopoly in legal production is replaced by "the existence and circulation in society of different legal systems . . . since there is not one single law but a network of laws that must be matched with society." De Sousa Santos concludes: "We live in a time of porous legality . . . of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is, by interlegality."[3] In order to meet the challenge of interlegality a number of solutions have been advanced: increased

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the European Parliament on European Contract law, of 1/07/2001, 2001 O.J. (C255) 1, *available at* http://www.europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0398en01.pdf; D. STAUDENMAYER, DIE MITTEILUNG DER KOMMISSION ZUM EUROPAEISCHEN VERTARAGSRECHT, EUROPAEISCHE ZEITSCHRIFT FUER WIRTSCHAFTSRECHT 485 (2001).

2. Brigitta Lurger, *Prinzipien Eines Europaeischen Vertragsrecht: Liberal, Marktfunktiona, Solidaerisch, Oder . . . ?*, *available at* http://www.ejcl.org/21/art21-2.doc, *at* 3: ". . . recent developments have been banished into special contract laws, the general law of contract assumes a residual function. Special contract laws themselves have lost their clarity and suffer a loss of dogmatic discipline." [Author's translation.]

3. Boaventra De Sousa Santos, *Law: A Map of Misreading. Towards a Postmodern Concption of Law*, 14 JOURNAL OF LAW & SOCIETY 279, 280-281, 298 (1987).

harmonization; the development of collision principles; or continued faith in the competition of legal orders.

This article aims to assess the future perspectives of Europeanized contract law given the Communication, the responses to the Communication, the pursuant Council Report* and the Resolution of the European Parliament.[4] The article begins with an analysis of the Europeanization of private law, a phenomenon against which the Communication is placed. The responses to the Communication are then evaluated before the action plan, developed by the European Council and Parliament, is mapped out. The focus then turns to the new quality of integration, which these developments announce, and the alternatives to the proposed reform from economic, conflict of laws, and regulatory perspectives. The paper concludes with an assessment of the problems in their global and interlegal context, a consideration of the next steps to be taken and an analysis of the wider implications of the initiative beyond the EC.

II. The Europeanization of Private Law

While there is nothing new about the observation that private law is influenced by a process of Europeanization,[5] the discussion of the future

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4. A5-0384/2001 European Parliament Resolution on the Approximation of the Civil and Commercial law of the Member States: Protocol of 11/15/2001 (COM(2001)398 C5-0471/2001 - 2001/2187(COS)), 2001 O.J. (C140 E) 538, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/ce140/ce14020020613en05380542.pdf; pursuant to: European Parliament Report on the Approximation of the Civil and Commercial Law of the Member States, Committee on Legal Affairs and the Internal Market, of 11/6/2001, Document: PE 308.471, *available at* http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//NONSGML+REPORT+A5-2001-0384+0+DOC+PDF+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y; Council Report on the Need to Approximate Member States' Legislation in Civil Matters (adopted 11/16/2001), *available at* http://register.consilium.eu.int/pdf/en/01/st11/11621en1.pdf *and* http://register.consilium.eu.int/pdf/en/01/st12/12735en1.pdf. Responses to the Communication, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/summaries/sum_de.pdf.

5. *See* W. HALLENSTEIN, EARLY REALIZATION OF EUROPEANIZATION: ANGLEICHUNG DES PRIVAT- UND PROZESSRECHTS IN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT, 28 RABELSZEITSCHRIFT [RABELSZ] 211 (1964). The phenomenon seized by the Parliament in two resolutions: Parliament Resolution A2-157/89 of 26.May 1989 On Action to Bring into line the Private law of the Member States, 1989 O.J. (C 158) 400; Parliament Resolution A3-0329/94, of 6. May 1994 On the Harmonization of Certain Sectors of the Private law of the Member States, 1994 O.J. (C 205) 518; Conclusions of the Tampere European Council (15 and 16 October 1999), *available at* http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm, *see in particular*, conclusions 28 and 39; Working Paper, Directorate-General for Research 'The Private Law Systems in the EU: Discrimination on the Grounds of Nationality and the Need for a European Civil Code,' Legal Affairs Series, JURI 103, *available at*

of European private law has only recently intensified as regional integration has increasingly permeated national legal orders. Though the perception of the EC legal order has traditionally focused on the high-profile 'public' provisions of the EC Treaty, as they cut into national prerogatives and address the State, the new perception focuses on 'private' secondary law, constituted by a forest of EC directives and regulations.[6] While it is clear that a single market requires a common framework of rules, the extensiveness of EC regulatory intervention is frequently underestimated. This network of interdependent regulatory law sets parameters for private autonomy and reaches into national private laws both directly, by controlling national norms intersecting with EC objectives, and indirectly, by setting interpretational parameters for national law in general. Again, the extensiveness of EC secondary law bears witness to how national executives have progressively transferred law-making powers to the EC.[7]

A brief overview of EC secondary law, incrementally and haphazardly expanded during the course of European integration, clarifies the areas in which harmonization has developed contract terms. While the majority of such secondary law deals with consumer protection;[8] the Commission's powers to legislate in competition law[9]

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http://www.europarl.eu.int/workingpapers/juri/pdf/103_en.pdf.

6. TREATY ESTABLISHING THE EUROPEAN, Nov 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC Treaty]. EC TREATY art. 249 (ex Article 189) provides: 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

7. Deirdre Curtin, *The Constitutional Structure of the European Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV 17 (1993) (observing how executives have cast themselves loose from their legislatures in this process).

8. Council Directive 93/13/EEC of 5 April 1993 On Unfair Terms In Consumer Contracts, 1993 O.J. (L 95) 29 (Unfair Contract Terms Directive); European Parliament and Council Directive 97/7/EC of 20 May 1997 On the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19 (Distance Contracts Directive); European Parliament and Council Directive 94/47/EC of 26 October 1994 On the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis, 1994 O.J. (L 280) 83 (Timeshare Directive); Council Directive 85/577/EEC of 20 December 1985 to Protect the Consumer in Respect of Contracts Negotiated Away from Business Premises, 1985 O.J. (L 372) 31 (Doorstep-selling Directive); Council Directive 90/314/EEC of 13 June 1990 on Package Travel, Package Holidays and Package Tours, 1990 O.J. (L 158) 59 (Package Travel Directive); Council Directive 87/102/EEC of 22 December 1986 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit (amended by Directive 90/88/EEC of 22 February 1990, 1990 O.J. (L 61) 14 (Consumer Credit II) and Directive 98/7/EC of 16 February 1998) 1987 O.J. (L 42) 48 (Consumer Credit I); European Parliament and Council Directive 1999/44/EC of 25 May 1999 on Certain Aspects of the Sale of

has led to the shaping of contract terms through block exemption regulations.[10] Moreover, contract terms have been promulgated in specific policy areas within the competence of the EC in environmental, health and safety and in the elaboration of product-related EC technical norms.[11] In this way, harmonization has penetrated increasingly larger

Consumer Goods and Associated Guarantees, 2000 O.J. (L 160) 1 (Consumer Guarantees Directive).

9. Commission Regulation 17/62/EEC First Regulation implementing Articles 85 and 86 of the Treaty 1959-62 O.J. (Special Edition) 87; Regulation 19/65/EEC of 2 March of the Council on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, 1965 O.J. (Special Edition) 35.

10. Commission Regulation 123/85/EEC of 12 December 1984 on the application of Article 85 (3) of the Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements, 1985 O.J. (L 15) 16; Commission Regulation 1475/95/EC of 28 June 1995 on the application of Article 85 (3) of the Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements 1995 O.J. (L145) 25; Commission Regulation 4087/88/EEC of 30 November 1988 on the application of Article 85 (3) of the Treaty to Categories of Franchise Agreements, 1988 O.J. (L 359) 46; Commission Regulation 2790/1999/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L336) 21; Commission Regulation 3932/92/EEC of 21 December 1992 on the application of Article 85 (3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices in the Insurance Sector, 1992 O.J. (L 398) 7; Commission Regulation 240/96/EC of 31 January 1996 on the application of Article 85 (3) of the Treaty to Certain Categories of Technology Transfer Agreements, 1996 O.J. (L 31) 2. *See generally:* Green Paper on Vertical Restraints in EC Competition Policy, COM (96) 721, final.

11. Given space constraints this list can only illustratively hint at the depth of regulation. Thus in the regulation of the environment EC law regulates, for example, on airborne pollution: Council Directive 87/217/EEC of 19 March 1987 on the Prevention and Reduction of Environmental Pollution by Asbestos, 1987 O.J. (L 85) 40; Council Directive 72/306/EEC of 2 August 1972 on the Approximation of the Laws of the Member States Relating to the Measures to be Taken Against the Emission of Pollutants From Diesel Engines for Use in Vehicles, 1972 O.J. (L190) 1; Council Directive 88/77/EEC of 3 December 1987 on the Approximation of the Laws of the Member States Relating to the Measures to be Taken Against the Emission of Gaseous Pollutants From Diesel Engines for Use in Vehicles, 1988 O.J. (L 36) 33; Council Directive 77/537/EEC of 28 June 1977 on the Approximation of the Laws of the Member States Relating to the Measures to be Taken Against the Emission of Pollutants From Diesel Engines for Use in Wheeled Agricultural or Forestry Tractors, 1977 O.J. (L220) 38; Council Directive 80/779/EEC of 15 July 1980 on Air Quality Limit Values and Guide Values for Sulphur Dioxide and Suspended particulates, 1980 O.J. (L 229) 30; Council Directive 85/203/EEC of 7 March 1985 on air quality standards for Nitrogen Dioxide, 1985 O.J. (L 87) 1; Council Directive 88/609/EEC of 24 November 1988 on the Limitation of Emissions of Certain Pollutants Into the Air From Large Combustion Plants, 1988 O.J. (L 336) 1; Directive 98/69/EC of the European Parliament and of the Council of 13 October 1998 Relating to Measures to be Taken Against Air Pollution By Emissions From Motor Vehicles and Amending Council Directive 70/220/EEC, 1998 O.J. (L 350) 1; Directive of the European Parliament and Council Directive 2000/69/EC of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air, 2000 O.J. (L 313) 12; European Parliament and Council Directive 2000/76/EC of December 4, 2000 on the Incineration of Waste, 2000 O.J. (L 332) 91; on waste management; European Parliament and Council Directive 94/62/EC of 20 December 1994 on Packaging and

areas of national private law through the common standards sought over a whole set of goals. Such common standards have been enacted which pertain to misleading advertising and insider trading, but also in less visible areas such as 'the rear-mounted roll-over protection structures of narrow-track wheeled agricultural and forestry tractors', or common standards 'for processed cereal-based foods and baby foods for infants and young children,' and to common standards for sweeteners used in food products.[12]

Further complicating this picture, the hallmark of harmonization has been the introduction of progressively higher EC standards, especially in the areas of consumer protection, that have been combined with the development of the concept of minimum harmonization. Minimum harmonization asserts the validity of overarching public interest objectives and allows Member States to exceed standards laid down in the relevant EC directive. A problem with minimum harmonization is

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Packaging Waste, 1994 O.J. (L 365) 10; Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, 1993 O.J. (L 30) 1; on environmental information: Directives Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, 1990 O.J. (L 158) 56; Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, 1985 O.J. (L 175) 40. In health and safety EC law regulates: Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, 1989 O.J. (L 183) 1; Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys, 1988 O.J. (L 187) 1). On product-related technical standards: everything from noise emissions from exhausts (Council Directive 70/157/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles, 1970 O.J. (L 42) 16); the fixing of safety belts (Council Directive 76/115/EEC of 18 December 1975 on the approximation of the laws of the Member States relating to anchorages for motor-vehicle safety belts, 1976 O.J. (L 24) 6), rear lights and fog lamps (Council Directive 76/760/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to the rear registration plate lamps for motor vehicles and their trailers, 1976 O.J. (L 262) 85; Council Directive 76/761/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to motor-vehicle headlamps which function as main-beam and/or dipped-beam headlamps and to incandescent electric filament lamps for such headlamps, 1976 O.J. (L 262) 96; Council Directive 77/538/EEC of 28 June 1977 on the approximation of the laws of the Member States relating to rear fog lamps for motor vehicles and their trailers, 1977 O.J. (L 220) 60).

12. Council Directive 84/450/EEC of 10 September 1984 Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising, 1984 O.J. (L 250) 17; Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, 1989 O.J. (L 334) 30; Council Directive 86/298/EEC of 26 May 1986 on rear- mounted roll-over protection structures of narrow-track wheeled agricultural and forestry tractors, 1986 O.J. (L 186) 26; Commission Directive 96/5/EC of 16 February 1996 on processed cereal-based foods and baby foods for infants and young children, 1996 O.J. (L 49) 17; European Parliament and Council Directive 94/35/EC of 30 June 1994 on sweeteners for use in foodstuffs, 1994 O.J. (L 237) 3.

that, while in the absence of 'full harmonization,' Member States are free to adopt higher domestic standards, the applicability of such standards to both domestic and imported products will vary according to the terms of the directive. Thus, if the directive contains a 'market access' clause then the higher national standard will be applicable only to domestically produced products; resulting in the 'reverse discrimination' of national products.[13]

As a consequence of the identified features of Europeanization: the progressively invasive influence of EC norms on national private law; the trend towards higher standards of EC consumer protection; and the institution of minimum harmonization, it is not surprising that a whole range of networks of European academics are currently at work on creating a *ius commune*, or common law, of Europe in the diverse and fragmented areas of private law.[14]

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13. Minimum harmonization allowing more stringent national measures where justified under the Treaty or case-law based mandatory requirements under the free movement 'rule of reason' laid down in: Rewe-Zentral AG v Bundesmonpolverwaltung für Branntwein (Cassis de Dijon), Case 120/78, 1979 E.C.R. 649:

> 'Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products . . . must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy the mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.'

EC TREATY art. 30 (ex 36) provides:

> 'The provisions of Articles 28 and 29 (ex 30 and 34) shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

Limits of EC intervention elaborated: *See also* Procureur de la République v ADBHU *(Used Oils),* Case 240/83, 1985 E.C.R. 531, judgment paragraphs 9, 12 and 15; reverse discrimination exemplified in: R v Secretary of State for Health, ex parte Gallaher, Case C-11/92, 1993 E.C.R. I-3545.

14. On *ius commune* initiatives *see*: WALTER VAN GERVEN ET AL., CASES, MATERIALS, AND TEXT ON NATIONAL, SUPRANATIONAL, AND INTERNATIONAL TORT (Hart ed., Oxford, 2000); SCHULZE R, ENGEL A & J JONES (EDS.) CASEBOOK EUROPÄISCHES PRIVATRECHT (Nomos, Baden-Baden, 1999); SCHULZE R & H SCHULTE-NÖLKE, CASEBOOK EUROPÄISCHES VERBRAUCHERRECHT (Nomos, Baden-Baden, 1999). Working groups: Study Group on a European Civil Code under Prof. C von Bar—successor to the Lando Commission which produced the principles of European Contract law, *available at* http://itl.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.toc.html; *see also* http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/index.html *and* http://www.sgecc.net; *see Tilburg Working Group on Tort law, at* http://www.civil.udg/es/tort/principles.htm; the *Trento Group on the Common Core of European Contract* website, *at* http://www.jus.unitn.it/elsg/common-core/home.html; the *Society of European Contract law* (SECOLA), *at* http://www.secola.org; and the *Working*

A. The Polycentric Multi-level System

A reduction of this problem to the relationship between national and EC law is inappropriate. Both international and conflict principles at least partially attempt to regulate or coordinate contract law. These attempts are seen in international initiatives that are aimed at determining the appropriate forum and regulating the relationships between international and regional law and national mandatory requirements. Increasingly, the law relevant to a contract dispute must be extracted from the multi-level system. The view of EC law, as one of the levels in a *polycentric multi-level system*; of a law which emerges from an interplay of national, international, *lex mercatoria,* and conflict principles[15] is ascendant.[16] Yet, the departure from the traditional view of demarcated legal systems with an identifiable hierarchy of norms and the embracing of a new porous legality creates problems, in which connection MacCormick has identified the continuing danger of an outdated "monocular" view of law.[17]

The main question which arises, given the multiplicity of legal cultures within which a variety of contractual concepts are diversely interwoven into the national legal fabric, is how the different legal norms from the different levels of the system can best be coordinated.[18] Especially in the area of cross-border transactions, the application of national private law, without reference to non-national legal sources is no longer possible, whether those sources are the Vienna Sales Convention or the EC-Rome Convention. On the other hand, despite the broad trend towards convergence within the EC, only a few of the non-national sources can truly be deemed to harmonize the law, as most regulate specific vertical areas rather than applying horizontally.

Team on Extra-Contractual Obligations, at http//www.europe.uos.de/ECC/index.htm.

15. *See* Andreas Furrer, *Response, at*10-11, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.4.pdf.

16. *See* Andreas Furrer, *Zivilrecht im gemeinschaftsrechtlichen Kontext at* 77 (Stämpfli, Berne, 2001): 'Community law operates to adjust or harmonize the law but simultaneously produces an additional regulatory level and so leads to greater complexity. National law is seldom wholly suppressed, but is, rather, complemented.' [Author's translation.]

17. MacCormick N, *Beyond the Sovereign State*, 56 MOD. L.REV 1 (1993).

18. *See Response, supra* note 15, at 10 ("in this way norms taken from tort, company and procedural law as well as from competition, environmental and constitutional law can play a significant role in the application of contract norms.") [Author's translation.]

B. Operational Parameters of EC Law in the Europeanization Process

The operational parameters of EC law further complicate the picture of a multi-level system. Four factors, to which attention should now turn, require special emphasis in this regard: the vertical impact of EC law; the functional operation of EC law; the trend to a more restrictive interpretation of the basic principles of EC law; and, finally, the influence of the negative and positive integration concepts on the parameters of EC law.

1. The vertical impact of EC law on national law.

Due to the fact that EC law-making has always required a reference to a particular legal base within the Treaty, EC law allows only a vertical impact on national private law. While this pointillistic approach in EC secondary law has been heavily criticized, this consequence is inevitable given the terms of the Treaty.[19] While the network of European norms which affect contract law has grown evermore dense, it has thus remained both uncoordinated as between the various norms and vertical in its conceptualization. Additionally, the norms that have emerged from this process have also varied: being both stricter in some areas and less invasive in others.[20] The European Parliament first approached the idea of codifying and rationalizing these disparate norms with two resolutions in 1989 and 1994 respectively.[21]

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19. C. JOERGES, THE SCIENCE PRIVATE LAW AND THE NATION STATE 63, EUI WORKING PAPER NO. 98/4 ("Private lawyers... rightly complain that the pointilliste operations of Community law inside the national legal systems have as a consequence system breakdowns, contradictory evaluations, and forced co-ordination, so that Community law acts at the same time innovatively and destructively, integratively and destructively.")

20. Juxtaposition of Directives cited in note 8 with: Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, 1986 O.J. (L 382) 17; (Commercial Agents Directive); European Parliament and Council Directive 2000/13/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 (E-commerce Directive); European Parliament and Council Directive 2000/35/EC of 29 June 2000 on Combating Late Payment In Commercial Transactions, 2000 O.J. (L 200) 35, (Late Payments Directive); Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability For Defective Products, 1985 O.J. (L 210) 29 (Defective Products Directive); European Parliament and Council Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on Cross-Border Credit Transfers, 1997 O.J. (L 43) 25.

21. *Supra* note 5, Resolutions A2-157/89 and A3-0329/94.

2. The functional operation of EC law.

In the course of European integration, the functional spillover theory has proved a more reliable guide than the purely federalist approach. Although federalists saw the motor of integration in the establishment of federal institutions, functionalists took a more pragmatic view. The functionalists assert that integration demands an increasingly invasive level of EC policy coordination and imply that this will trigger a progressive erosion of national sovereignty. According to functionalists, integration requires not simply the abolition of custom duties, but also the elimination of other obstacles to free movement, whether they operate directly or indirectly, and regardless of whether they are instituted by the State or are imposed through private agreement.[22] The EC Treaty, therefore, can be characterized, in de Sousa Santos' terms, as a "porous" legal document, in which policy areas have reciprocal effects upon one another and thus provide the basis for interpenetrations, overlappings, and organic growth, rather than as a self-contained legal regime. This dynamic is reflected in the penetration of national public and private law: beyond the application of the fundamental freedoms in the public context and reaching into private law relationships.[23] Incrementally, broader policy areas are engaged, and subsequently subjected to harmonization, as integration proceeds: the internal market requires an increasingly tighter coordination of a common currency and of minimum standards in environmental protection, social policy, and in consumer protection.[24]

3. The trend to a more restrictive interpretation of Basic Principles of EC law.

While the doctrines against which EC law is interpreted—*effet utile*, the uniform application of EC law, direct effect, supremacy, the autonomy of EC law and the compatibility of acts of Member States and European Institutions with the EC Treaty and secondary law—as

22. Procureur du Roi v. Dassonville 1974 E.C.R. 837 (in free movement on the ability of state measures to 'directly or indirectly, actually or potentially' fragment the market); similarly in context of competition: Consten & Grundig v. Commission, 1966 E.C.R. 299, at 341 ("whether private agreements are: 'capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade'").

23. The impact of EC law on the national law expanded with the Single Market program and intensified with the broadening of competences in the Amsterdam Treaty. On the broader context of EC law *see generally* I. KLAUER, DIE EUROPÄISIERUNG DES PRIVATRECHTS 62 (1998): ("the application of the fundamental freedoms is not limited to state regulation in public law . . . but also embraces Private law."). [Author's translation.]

24. R. GIBB & M. WISE, SINGLE MARKET TO SOCIAL EUROPE 33-36 (1993).

developed by the European Court of Justice[25] have proven instruments confirming functionalism, both Member States and, more recently, the European Court of Justice have tried, if selectively, to stem the apparent tide of powers being progressively vested with the EC. They have insisted on a prioritization within the Community's tasks through, for example, the introduction of *de minimis* style tests. To a large extent, this trend has been the product of the success of functionalism, for the problem with functionalism is that it is boundless and leaves the European Court of Justice 'riding a tiger' of its own making.[26] While unrestricted functionalism begs the question of where the outer limits of EC competences are located, restrictive interpretation attempts to compensate for this phenomenon.

In this trend to restrict the operational scope of EC law, the requirement of a legal base in the EC Treaty for any legislation passed has played an increasingly important role.[27] Similarly, the introduction of the principles of Proportionality and Subsidiarity reflect this more restrictive trend.[28] Further evidence of a more restrictive approach is found in the increasingly influential role assigned to the European Parliament in passing legislation: following Article 5(3) EC Treaty, the Community may go no further than *necessary* to achieve a specific goal, while Article 5(1) of the EC has been interpreted to require that the European Parliament be involved to the maximum extent in the law-making process.[29]

Finally, the European Court of Justice has more recently tried to

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25. Interpretational approach of the Court of Justice: H. Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28 (1988); M. Cappalltti, *Is the European Court of Justice Running Wild?*, 12 EUR. L. REV 3 (1987); T. Tridimas, *The Court of Justice and Judicial Activism*, 21 EUR. L. REV. 199 (1996); J. BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE (1993).

26. S. WEATHERILL & P. BEAUMONT, EC LAW 478 (1993).

27. Article 253 EC (ex Article 190) provides: "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty." Interpretation: *Commission v Council (Tariff Preferences)*, Case 45/86, 1987 E.C.R. 1493, at 1519-1520.

28. On Subsidiarity, EC TREATY art. 5 (ex Article 3b) provides:

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale and effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

29. Commission v Council, 1991 E.C.R. I-2867 at 20.

supply guidance on the outer limits of EC law within the national legal orders. It is in this context that the decisions in *Keck* and *Tobacco* have to be placed: in *Tobacco* the Court of Justice indicated the extent of the Community's legitimate law-making capacity, while the court in *Keck* explicitly rejected the necessity of an ever-deeper harmonization of national sales modalities' law. These steps announce an important caveat to the scope of functionalism.[30]

The Basic Principles of EC law

- **Direct effect:** the EC legal order confers rights on individuals, regardless of whether the right in question has been transposed, and is enforceable in national courts so long as the provision is sufficiently clear and precise.[31]

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30. Germany v Parliament and Commission (Tobacco), 2000 E.C.R. I-8419 at para. 83:

> "Those provisions, read together, make it clear that the measures referred to in Article 100a(1) (now Article 95) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it."

Para 84:

> " Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164 of the EC Treaty (now Article 220 EC) of ensuring that the law is observed in the interpretation and application of the Treaty."

Case. C-267 and 268/91 *Bernard Keck and Daniel Mithouard* [1993] ECR I-6097: states generally that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially, trade between Member States, provided that the provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. *See also* L.W. Gormley, *Reasoning Renounced? The Remarkable Judgment in Keck and Mithouard*, EUR. BUS. L. REV. 196 (1994); M.P. Maduro, *Reforming the Market or the State? Article 30 and the European Economic Constitution: Economic Freedom and Political Rights*, 3 EUR. L. J. 55 (1997); S. Weatherill, *Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregultion*, 36 CM. L. REV 51 (1999).

31. *Van Gend en Loos v Nederlandse Tariefcommissie,* Case 26/62, 1963 E.C.R. 1 at

- **Supremacy:** Community law has precedence over countervailing national law.[32]
- **Effet utile:** the practical 'useful' effect rather than the form or method by which EC objectives are achieved is what is important, this: '*would be weakened if individuals were prevented from relying on it before their national courts.*'[33]
- **Effectiveness:** an extension of *effet utile,* the effectiveness of national remedies works, as in *Factortame* and *Francovich*, to secure Community objectives.[34]
- **Uniform application:** EC law must be applied in its entirety.[35]
- **Autonomy of EC law:** a *sui generis* order demanding contextual interpretation.[36]

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pp.12-13: 'the Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights albeit in limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law therefore imposes obligations on individuals bit is also intended to confer upon them rights which become part of their legal heritage.'.
On the 'unconditional and sufficiently precise' requirements: *Pubblico Ministero v Ratti,* Case 148/78, 1979 E.C.R. 1629, at p.1642; *Becker v Finanzamt Münster-Innenstadt,* Case 8/81, 1982 E.C.R. 53, at p.71.

32. *Costa v ENEL,* Case 6/64, 1964 E.C.R. 585 at p.594 'The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms of and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.' *Aministrazione delle Finanze dello Stato v Simmenthal SpA,* Case 106/77, 1978 E.C.R. 629, judgment para. 17: 'in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions . . . and the national law of the Member States . . . is such that those provisions and measures . . . by their entry into force render automatically inapplicable any conflicting provisions of . . . national law.'

33. Van Duyn v Home Office, Case 41/74, 1974 E.C.R. 1337, at p.1348. According to Rasmussen, *supra n.*25 whilst facilitating an ever greater intrusion of EC into national law, *effet utile* remained a 'nebulous' concept.

34. On effectiveness: R. v Secretary of State for Transport, ex parte Factortame, Case C-213/89, 1990 E.C.R. I-2433; judgment para. 21:

> "It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law . . ."

Francovich and Others v Italian State, Joined Cases C-6/90 and C-9/90 1991 E.C.R. I-5357, judgment para. 33: 'The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.'

35. Amministrazione delle Finanze dello Stato v Simmenthal, Case 106/77, 1978 E.C.R. 629 at 643.

36. CILFIT v Ministero della Sanità, Case 283/81, 1982 E.C.R. 3415 at p.3430:

> "Community legislation is drafted in several languages and that the different

▪ **Compatibility of national and institutional acts within the EC Treaty:** interpretation of acts by national authorities or European institutions in line with EC law.[37]

4. The Tension between Positive and Negative Integration.

The view of the Treaty as supplying an 'Economic Constitution' *(Wirtschaftsverfassung)* has traditionally been seen by German *Ordoliberals* as a mandate for asserting private autonomy and a strengthening of the 'private law society' (*Privatrechtsgesellschaft*). Notwithstanding these views, the EC legal order is both erosive of national law[38] and simultaneously shaped by national law.[39] Despite the *Ordoliberal* view of a legal order integrating markets purely *negatively*, a positive, regulatory aspect is imminent within the Treaty, finding material form in EC secondary law and being underscored by mutual recognition: free movement is, for example, dependent upon uniform safety standards which are erosive of private autonomy.[40] The criticism of vertical harmonization is, however, reflected in the new approach to technical harmonization.[41] Through the process of negative integration,

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language versions are all equally authentic . . . It must also be borne in mind . . . that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various member states. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."

37. von Colson und Kamann v Land Nordrhein Westfalen, Case 14/83, 1984 E.C.R. 1891, at p.1907; Marleasing v La Commercial Internacional de Alimentacion, Case C-106/89, 1990 E.C.R. I-4135

38. This position still finds supporters see, for example, the conference call of the Young German Civil Lawyers: http://www.junge.zivilrechtswissenschaftler.de

39. E. Steindorff, EG Vertrag und Privatrecht (Nomos, Baden-Baden,1996), p.42: 'In a legal order shaped by the free market model and the principle of subsidiarity, autonomous decision-making and organization by individuals has to be secured. . . Private law therefore assumes a core function . . .' (my translation); Wolf Sauter, *The Economic Constitution of the European Union* 4 COLUM. J. EUR. L. 27, 51 (1998). "The flaws of the *Ordoliberal* approach result from its tendency to underestimate the importance of the political dimension and the dynamism of European integration . . ."; *Colloquium papers:* La Constitution Économique Européenne: Actes du Cinquième Colloque sur la Fusion des Communautés européenes, (Martinus Nijhoff, The Hague, 1971) respectively: Markert K at pp.207-236 *contra* Dehousse F at pp.9-15); Mestmäcker EJ, On the Legitimacy of European Law, 58 Rabelszeitschrift [RabelsZ] 615-635 (1994).

40. N. REICH, BÜRGERRECHTE IN DER EUROPÄISCHEN UNION 362, (Nomos, Baden-Baden, 1999): 'free movement of goods cannot be achieved when product safety requirements are significantly divergent as between the Member States. A high level of protection can only be achieved when dangerous products are subject to the same standards in all Member States.' [Author's translation.]

41. Council Resolution of 7 May 1985 on a New Approach to Technical

national law is eroded, while 'positive' measures of harmonization at EC level, seen in particular in the '1992 stage' of the transformation of EC law, are increasingly required as integration proceeds.[42] At this point we begin to appreciate the parameters of the Europeanization of private law; conditioned by the need for uniform application and by the broader trend towards convergence amongst the national legal orders.[43]

C. Legal Porosity in the Multi-level System

Having mapped out both the conception of the multi-level system and the operational parameters of EC law, we are now able to chart the interplay of EC, national, and international norms. An overview of the legal levels underscores the coordination problems:

- **International Level:** At the international level a heterogeneous structure of norms emerges from the WTO, the European Convention on Human Rights (ECHR), the Conventions of the ILO, TRIPS, the UNIDROIT and UNCITRAL principles as well as provisions made by the Hague Convention and the framework rules provided by the Vienna Sales Convention.[44] These instruments are notable not only for their selective, vertical approach, but also for their internal diversity: some are directly applicable (as is the ECHR), whilst others are indirectly applicable (as is WTO-law); the instruments are, furthermore, uncoordinated amongst themselves. Additionally, the principles elaborated at the international level, within the UNIDROIT and UNCITRAL frameworks, are characterized by a level of abstraction, which can compromise their practical utility. Finally, not all international instruments have enjoyed trans-European ratification: the Vienna Sales Convention, for example, still awaits ratification in the UK, Ireland and Portugal.
- **EC-International Level:** The EC has, traditionally, entered into intergovernmental conventions, which have been held to be subject to the jurisdiction of the European Court of Justice and integrated into the single market structure. Since the Treaty of Amsterdam, the majority of

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Harmonization and Standards, 1985 O.J. (C 136) 1.

42. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L J 2403 (1991) (charting three stages in the transformation of EC law from the 'foundational', to the 'mutational' and concluding in with the '1992' stage).

43. *Supra* note 15, Response at p.17.

44. *See* http://www.ilo.org; http://www.unidroit.org; *and* http://www.un.or.at/uncitral/en-index.htm; *see also* Vienna Sales Convention, United Nations Convention On Contracts For The International Sale Of Goods,1980 [hereinafter CISG], 52 Federal Register 6262, 6264-6280 (March 2, 1987) (United Nations certified text in the United States); 15 U.S.C.A. Appendix (Supp. 1987). See http://www.cisg.law.pace.edu/cisg/text/treaty.html. *See generally*, Furrer A, *supra* note 16, at p.127-131.

these Conventions have been transposed into EC secondary law.[45] For example, the Brussels' Convention on the Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters has been transposed into the Brussels I Regulation.[46] The Rome Convention on the law applicable to contractual obligations is the only EC-International Convention now left at this level.[47] Aside from the determination of the applicable law, the parties' choice of law can be affected by the Convention where national law recognizes international

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45. Treaty Of Amsterdam expanded the Community's competence on the plane of international judicial cooperation through the introduction of Article 73m into the EC Treaty, now Article 65 EC, which provides:

> Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary fore the proper functioning of the internal market shall include:
>
> (a) improving and simplifying—the system for cross border service of judicial and extrajudicial documents;—cooperation in the taking of evidence;—the recognition and enforcement if decisions in civil and commercial cases, including decisions in extrajudicial cases;
>
> (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and if jurisdiction;
>
> (c) eliminating obstacles to the good functioning if civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

46. Council Reg. 44/2001/EC of 22. Dec. 2000, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf. Replacing the Brussels Convention passed on 27 September 1968, as amended by Conventions on the Accession of the New Member States to that Convention. On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Council Regulation 1347/2000/EC of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, 2000 O.J. (L 160) 19, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_160/l_16020000630en00010018.pdf Replacing The Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters, 1998 O.J. (C 221) 2) Council regulation 1348/2000/EC of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 2000 O.J. (L 160) 37: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_160/l_16020000630en00370052.pdf

Replacing the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, of 26 May 1997, 1997 O.J. (C 261) 2. The proposed Convention on insolvency rules was directly passed as a regulation: Council regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 1 http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_160/l_16020000630en00010018.pdf. Generally *Furrer*, *supra* n.16 at pp. 139-148.

47. 1980 Rome Convention on the Law Applicable to Contractual Obligations, of 19 June 1980, Consolidated version: 1998 O.J. (C27) 36.

mandatory requirements. In this connection, Article 7 protects national legal orders where a non-discriminatory public interest stands behind the recognized international mandatory requirements.[48]

- **EC Level:** EC secondary law has produced a patchwork of vertical norms developed by diverse Directorates-General and employing divergent approaches. Through this divergence different effects are produced within the national legal orders.[49]
- **National Level:** At the national level, the operation of the diverse legal traditions leads to further fragmentation. While this can be seen in the interface of *Common* and *Civil Law* in particular, national legal traditions, in a more subtle way, are also responsible for the divergent transposition of EC Directives into national law.

III. The Communication on European Contract Law

It is against this background that the Commission's Communication on European Contract law is to be placed. According to the Commission, the porous interface in contract law is inefficient and an obstacle to further integration due to four reasons. First, differences in national law, above all between national mandatory requirements, mean that, as uniform sales strategies cannot be adopted across the EC, the goal of a single market is frustrated. Second, the high level of information costs discourages small and medium-sized enterprises (SMEs) and many consumers from participating in cross-border trade. Third, the combination of legal differences and high information costs leads to a reduction in competition. Fourth, some undertakings engage in cross-border trade either in ignorance or in misapprehension of the law relevant to their transactions.[50] Although these problems appear

48. *Id.* Article 7 of the Rome Convention provides:

> Article 7
> (1) When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
> (2) Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.'

49. O. REMIEN, ÜBER DEN STIL DES EUROPÄISCHEN PRIVATRECHTS, 60 RABELZEITSCHRIFT [RABELSZ] 7 (1996).

50. O. Lando, C.von Bar, *Response to the Communication on European Contract Law*: *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.23.pdf:

> "Divergent contract law makes it . . . impossible to engage effectively in

significant, one could dispute whether these problems are as serious as the Commission contends. Moreover, the idea that a consolidated contract or private law code can efficiently, or even necessarily solve these problems, demands a more detailed survey.

At all levels of the multi-tier system, and in the coordination of the levels therein, there is a potential for conflict, which grows with the increase of cross-border trade. The efficient application of private law becomes increasingly important, yet simultaneously more illusive.[51] The Communication can be seen, as mandated by the European Council, as a first step in an assessment of the state of contract-relevant provisions of secondary EC law.[52] Yet, given the wider discussion on the place of private law in the integration process, the Communication can also be seen as an attempt to limit initial reform to the area of contract law, or as an attempt to cut out of private law the centerpiece of contract for specific harmonization. If the first of these approaches is correct, the role intended for contract appears to be that of a catalyst in the process of a wider harmonization of private law. However, if the second alternative is correct, it is difficult to see how contract can be cleanly delineated from general private law.

The Communication focuses upon the problems of a continued uncoordinated development of EC law as it relates to contract provisions; a development which frustrates market integration as much as it compromises the uniform application of EC law.[53]

Additionally, an attempt is made to map the divergent national

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> the European market on an informed basis. Businesses which nonetheless dare to take that step are often burdened by costs which are either superfluous or unforeseeable. Risks of liability are extraordinarily difficult to gauge; often they are simply absorbed and may make business unprofitable or loss-making." *Id.*

51. EEA-EFTA Countries, *Response to the Communication on European Contract Law,* *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/1.2.pdf.

52. Conclusions of the European Council in Tampere, *supra* note 5, at para. 39.

53. Case.C-357/98 The Queen v Secretary of State for the Home Department ex parte Nana Yaa Konadu Yidom, 2000 ECR I-9265, judgment, para. 26:

> "It should also be recalled that the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question."

See also Ekro v Produktschap voor Vee en Vlees, Case 327/82, 1984 E.C.R. 107, para. 11; and State of the Grand Duchy of Luxembourg v Linster and Others, Case C-287/98, 2000 E.C.R. I-0000, para. 43.

provisions that are particularly problematic for SMEs.[54] The Communication sets as its goal the generation of discussion on the basis of four options:

- Option I: not to intervene but to rely on a competition of legal orders.[55]
- Option II: to assess whether non-binding principles, formulated along the lines of the UNIDROIT or Lando Principles, are necessary.[56]
- Option III: to assess whether improvements or consolidation of the existing instruments at EC level is required;[57] and whether an extension of the vertical scope of directives may be called for.[58]
- Option IV: to determine whether new instruments are necessary: a consolidated EC Contract Code could be elaborated in this regard, either on an opt-in or opt-out basis.[59]

A. Opening Pandora's Box

The tabling of these options opens a Pandora's box of controversy. While the focus brought to the phenomenon of Europeanization and the increasing regional and global aspects of transactions is something to be welcomed, the Communication is also striking for the range of questions, both of theoretical and practical significance, with which it intersects:

Whether the Europeanization of contract is inevitable and can be integrated into the wider transformation of EC law as a legal order which has more invasive and novel implications for national law as integration proceeds?[60]

Whether the difficulties associated with the *pointillistic* law-making approach suggest that both the future and the identity of EC law stand to disposition: implying that EC law will have to abandon functionalism and embrace a federal Code?

Whether a contract code would function as a straitjacket, removing all uneven aspects of national contract law, or whether a legal system

54. Communication, *supra* note 1, para. 23.

55. *Id.* at paras. 49-51.

56. *Id.* at paras. 52-56; see C. Schmid, *Response to the Communication on European Contract Law, available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.17.pdf.

57. Such consolidation could be undertaken on the basis of the SLIM initiative: S. Leible, *Response to the Communication on European Contract Law* at 9, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.10.pdf; SLIM Initiative—Simpler Legislation for the Internal Market—COM (1996) 204 final (Evaluation COM (2000) 104 final.).

58. Communication, *supra* note 1, para. 60.

59. *Id.* at para. 65.

60. *See generally* Weiler, *supra* note 42.

drawing its strength from plural legality can be maintained?

The quality of the ostensibly fundamental principles of EC law, in particular those of subsidiarity and proportionality: does the logic of these principles no longer convince in a mature Community?

The role of economic analysis in legal reform: what are the economic arguments that speak for a consolidation and how is the economic case quantified?

Questions relating to the application, limits and need for a broader reform of EC law. Can the uniform application of EC law be secured without broad harmonization? Can we identify an outer limit to the Treaty? Does the Treaty require revision to secure the competence to harmonize or create a new instrument of EC law?

Further questions arise as to the content, goals and motivations that would stand behind a common contract law in the EC.

B. Extent and Instruments of Harmonization

Superficially, the reform options are designed to invite debate and leave the questions relating to the extent, style and instruments of harmonization open. Yet the options have a chameleon-like character: under Option IV either a restricted harmonization of only those directives regulating cross-border trade or a more comprehensive 'unification' of both interstate and domestic contract law appear possible. Should a general contract code emerge from this, national norms which had so far escaped Europeanization would be embraced. Equally, while some argue that the project should be extended to cover private law in general, there have also been suggestions that the scope of reform be reduced to the field of consumer protection. Given the breadth of options, it is important to retain an appreciation of the diversity of the extent of reform that could emerge:

- The 'unification' of contract law in Europe, displacing domestic contract law;
- The harmonization of cross-border and policy-based EC law;
- The harmonization of the purely cross-border aspects of contract law;
- Harmonization of only the consumer protection aspect of cross-border transactions;
- Maintaining the current vertical, *pointillistic* approach and competition of legal orders.

On the appropriate instruments for achieving either the harmonization or unification of contract law, again a range of options is presented in the Communication. Option IV presents the most radical proposal: of passing a new instrument of EC law. A less invasive option

would be a consolidation: replacing vertical with horizontal directives while maintaining minimum harmonization. Much depends, in this choice of instruments, on the balance struck between ensuring private autonomy and legal plurality and answering the need for a coherent and uniformly applied law. In order to achieve a more coherent law, minimum harmonization could be struck from any horizontal directive(s) that could potentially emerge. Yet, if the goal is to ensure the largest measure of coherence, a stronger case for the use of regulations can be made. While regulations, however, are perceived as ensuring uniformity more securely than directives, it can be countered that regulations pay lip-service to legal certainty. Additionally, it can be argued that the reform exercise must be aimed at more than the preclusion of Member States' ability to introduce higher standards.

In addition to the different models of the extent and instruments of reform, the method by which any instrument(s) would be passed into law is open to debate: whether by unanimity or qualified majority, or whether use should be made of the cooperation procedure between Council and the European Parliament. In this regard, the question of the strategy behind the reform arises: should a step-by-step approach be adopted, beginning with existing secondary law, or should the more radical course be selected; beginning with the introduction a code of contracts.[61] Again the instruments of reform are diverse:

- Horizontal codification to achieve unification;
- Horizontal Regulation(s) to replace the patchwork of vertical directives;
- Horizontal directives, incorporating or excluding minimum harmonization.

C. *Result-orientation in the Communication*

While the Communication appears to welcome debate and presents a list of alternatives, it is not a neutral document. This lack of neutrality is illustrated when one observes that neither the inaction proposed in Option I, nor the improvement of existing legislation proposed in Option III, are in fact real options. In reality, the law-maker can neither ignore shortcomings in existing legislation, nor can he be against the idea of improving legislation. The result-orientation of the Communication can be seen in this presentation of 'non-options,' a practice which focuses attention on Options II and IV. As with the modernization of EC

61. W. van Gerven, *Response to the Communication on European Contract Law*, at p.20, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.5.pdf.

Competition law, the Commission does not appear to take into account alternative options in policy formulation: neither the advantages of a competition amongst legal orders, nor the possibility of developing European conflict rules are considered in the Communication.[62]

IV. Responses to the Communication

Given the problems identified so far, attention now turns to an analysis of the responses made to the Communication. These have been placed on the Commission's website.[63] The origins of the responses are their first striking feature: Germany and the UK are proportionately over-represented; mainly through academic responses in Germany and by responses from legal practice and industry in the UK. The Mediterranean countries are proportionately under-represented, while no responses were received from either Ireland or Luxemburg. These results make the divide between north and south, and between export-oriented and less export-oriented countries, unquestionably transparent. Moreover, the divide between *common law* and *civil law* countries, and the division of labor in the market for international legal services, is reflected in the responses; the Communication provoking hostility in the UK and being welcomed in Germany.

In terms of the 'European vision' contained in the responses, analysis reveals a largely federalist vision in France,[64] a more functionalist approach in many of the German responses, and an altogether more hostile response in the UK. It should be noted that, with respect to the UK, this not just in the responses from industry and legal practice but also in the response of the UK Consumers' Association. Additionally, a comparison of the responses from the UK and Germany reveal diametrically opposed perceptions of the Communication. In Germany, the Communication is shown to be perceived as an opportunity to defend the European, civil law-based, preventive approach, while in the UK it is seen as a threat to the common law, litigation-based approach. These varying perceptions make clear, as Wilhelmsson observes, that the responses tend to reflect personal

62. *See Response*, *supra* note 15, at 6: "From the comments made in the Communication, the Commission's conviction is reflected that intervention in the market is necessary." (my translation). The parallel to the reform of EC Competition law: R. WESSELING,The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' 20 ECLR (1999) 420.

63. Commission Website, *supra* note 4.

64. J-B Racine, *Response to the Communication on European Contract Law*, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.30.pdf.

ambition, and the sometimes objectively indefensible professional interests within individual countries.[65] An important conclusion, however, is to be drawn from the origins and tenor of the responses. This conclusion is that, if a reform is to emerge from this process, a compromise solution integrating a number of options will be the result.

Table 1: Origins of the Responses

	Governments	Business	Consumer Associations	Legal Practice	Academic	Totals
Austria	1	1	0	3	0	**5**
Belgium	1	0	0	0	2	**3**
Denmark	1	0	0	0	2	**3**
Finnland	2	0	0	0	1	**3**
France	1	2	1	1	2	**7**
Germany	2	8	0	7	22	**39**
Greece	0	0	0	0	2	**2**
Ireland	0	0	0	0	0	**0**
Italy	1	1	0	3	6	**11**
Luxemburg	0	0	0	0	0	**0**
Netherlands	0	0	0	0	5	**5**
Portugal	1	0	0	0	0	**1**
Spain	0	1	0	1	10	**12**
Sweden	1	2	0	1	4	**8**
United Kingdom	2	11	1	7	5	**26**
International	0	18	2	4	4	**28**
EU	13	44	4	27	65	**153**
Non EU	2	0	0	0	5	**7**
Totals	**15**	**44**	**4**	**27**	**70**	**160**

A. Identified Problem Areas

1. Problems at EC level

The problems identified at the EC level, some of which have

65. T. Wilhelmsson, *Private Law in the EU: Harmonised or Fragmented Europeanisation*, ERPL 77 (2002), 83-84. On the opportunity reform presents for defending the Civil law approach *see* the German Notaies' Association *Response to the Communication on European Contract Law, available at:*http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/4.6.pdf.

already been dealt with in this analysis, are briefly mapped out in this section, beginning with the more general problems:

- The patchwork of EC contract norms damages the coherence of EC law itself.[66]
- Vertical, sector-specific EC secondary law does not admit the fact that a contract may be touched by a number of directives: a doorstep sale may cut across a host of directives relevant to consumer protection, credit and information.
- Exemptions made from directives are motivated by political horse-trading rather than by considerations of legal certainty.
- Minimum harmonization clauses pre-program legal fragmentation.[67]
- The absence of a common legal terminology and reference system in EC law causes a lack of coherence in law-making.[68]
- The introduction of progressively higher standards of consumer protection has caused a further erosion of coherence: the distance sales directive (97/7/EC), for example, pursues a higher standard of protection than the doorstep sales directive.
- EC directives are the culturally specific products of the diverse Directorates-General.

More specific problems emerge from the interplay between the formulations found in individual pieces of secondary law:

- Not only is it increasingly hard to demarcate different directives, 'porous' vertical directives regulating similar situations may impose variable standards on Member States in transposition. For example, whilst the Distance sales directive obliges Member States to make provision for an opportunity for the consumer to opt-out, the ISDN Data protection directive allows Member States to employ either an opt-in or opt-out approach in national transposition.[69]
- In consumer contracts, withdrawal from the contract is subject to

66. Schmid, *supra* note 56, at 8: "the functionally selective regulatory approach, which has led to an incomprehensible permeation of national systems with islands of Community law that grow ever larger, causing numerous fragmentations, unforeseen constraints and contradictions."

67. *Supra* note 41; *see also* J Pelkmans, *The new Approach to Technical Harmonization and Standardisation*, 25 J..COMMON MKT. STUDIES 249 (1986-7); Weatherill & Beaumont, *supra* note 26, at 527-529.

68. O. Lando, *Why Codify the European Law of Contract*, ERPL 525, 530 (1997).

69. *See* S. Leible, *supra* note 57, at 11: 'In which relationship the two directives stand to one another and which consequences arise from this as far as the regulatory competence in the Member States is concerned has not yet been clarified' (my translation). See Article 10 (2) Distance Sales Directive *supra* note 8, and Article 12 (2) Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997, concerning the processing of personal data and the protection of privacy in the telecommunications sector, 1998 O.J. (L 24) 1.

various time limits: 7 days, 7 working days and 10 days depending on the directive.[70]

- Divergence in the treatment of consumer contracts and contracts for services emerges: that the treatment of guarantees in the consumer context should be harmonized but not in the services' context is, for example, unconvincing.[71]
- The directive on doorstep sales (85/577/EEC) and that on distance sales (97/7/EC) introduce divergent standards and exemptions which, in turn, are not coordinated with other directives: hire contracts outside the remit of the Timeshare directive (94/47/EC) are, for example, excluded from the field of application of the Doorstep sales directive.
- Terms within directives are inadequately defined; making reference to the European Court of Justice on points of interpretation necessary. This is exemplified in the formulation of the 'package' under the package holidays directive (90/314/EEC).[72]
- The use of static terms, such as the 'Timeshare', mean that as commercial practice is adjusted to evade application of EC law gaps appear in consumer protection.
- An inadequate definition of the subjects addressed by individual directives leads to fragmentation. For example, the electronic sales directive (2000/31/EC) applies to both B2B and B2C contexts.[73]

2. Problems at the National Level

While some point to the rather abstract similarities in the approach to contract law in the Member States, which include offer, acceptance, consensus, it is undeniable that important differences remain. In particular, the tension between common and civil law is a source of divergence. This is seen in the assessment of the point at which a contract is concluded, in the requirement of, and specific elements of

70. Article 5 Doorstep Sales; Article 6(1) Distance Sales; Article 5(1) Timeshare Directive all cited *supra* note 8.

71. *See* Response, *supra* note 57, at 12.

72. Elaboration of the 'package': Club Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido, 30 April 2002, Urteil, Para. 19:

> ". . . the term 'package' in Article 2(1) of the Directive must be interpreted so as to include holidays organised in accordance with the consumer's specifications, the term 'pre-arranged combination' which constitutes one of the elements of the definition of 'package', necessarily covers cases where the combination of tourist services is the result of the wishes expressed by the consumer up to the moment when the parties reach an agreement and conclude the contract."

73. S. Camara Lapuente, *Response to the Communication on European Contract Law*, at 4, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.28.pdf.

contractual formality, in the requirement of consideration, and in the point of time at which an offer is valid or at which a party may withdraw from the contract. Moreover, there are differences between common and civil law, as well as amongst civil law jurisdictions, in the treatment of the *battle of forms* and the consequences of the seller's silence on contractually relevant information. Similar divergence emerges in the treatment of *unconscionable terms*, the treatment of the intent of the parties, the measurement of limitation periods, the attribution of responsibility, and the determination of the setting-off of obligations. It is important, however, to underscore that the lack of coherence at the national level is not only a product of the differences between national legal orders, but is also brought about by the different national transpositions and the institution of 'minimum harmonization':[74]

- Minimum harmonization allows Member States to exceed the standards targeted in directives. This has the most serious consequences when a Member State elects a higher standard than required and declares that standard as a feature of its *ordre public*.[75]
- This problem is accentuated by the lack of clear demarcation between internal and cross-border contracts. Contracts which superficially have only domestic relevance may, as with factoring contracts, work to fragment the market; rendering a common approach impossible. The same can be observed in the case of insurance contracts, where providers are bound to national law and cannot adopt common sales' strategies for the European market.[76]
- Finally, the sometimes bizarre specificities of national legal systems cut across and frustrate the achievement of EC objectives. For example, that the marriage or partner-matching agency cannot, under German law, require payment for its services can be seen as incompatible with the goal of a single market.[77]

3. The Boundaries of an International Approach

The existing instruments of international private law are seen as inadequate by the Commission, an inadequacy which can be attributed to

74. *Id.* at 5.

75. German Federal Banking Association, (Bundesverband deutscher Banken), *Response to the Communication on European Contract Law,* p.3, *available at*: http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/2.3.2.pdf.

76. *See* Lando & von Bar, *Response to the Communication on European Contract Law*, *supra* note 50, at 11-12.

77. Remien O., *Response to the Communication on European Contract Law*, p.2 (§ 656 BGB), *available at*: http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.15.pdf.

a number of factors. The EC Rome Convention, for example, is inapplicable in many cases. It is restricted to EC Member States, and does not apply to questions of status and capacity, wills, family law, cheques, arbitration, trusts and insurance. Furthermore, the convention adopts special rules on immovable property, the transport of goods and employment contracts, and it restricts the choice of law in B2C transactions: under Article 5 of the Rome Convention, where the national norm has mandatory character, the law of the consumer's habitual place of residence is applicable.[78] Consequentially, conflicts arise where the mandatory requirements of different national legal orders, as respected by international private law, diverge.

Meanwhile the Vienna Sales Convention, which plays a crucial function at the interface of harmonization and international private law, does not apply to contracts for the sale of stocks, shares, ships, aircraft and electricity or to the supply of services. Furthermore, although it deals with the formation of the contract and obligations arising out of the contract, the Vienna Convention does not deal with the validity of the contract, the effect the contract may have on property in the goods sold, or the liability of the seller for death or personal injury caused by the goods.[79] Moreover, the framework provided lacks coherence in the

78. Article 5(2) of the Rome Convention, *supra* note 47 which provides:

> Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.
> – if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
> – if the other party or his agent received the consumer's order in that country or
> – if the contract is fort he sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller fort he purpose of inducing the consumer to buy.'

Though in the EC in this respect harmonization has been achieved in Directives 1999/44/EG (Consumer Guarantees Directive); Directive 93/13/EWG (Unfair Contract Terms Directive); Richtlinie 90/314/EWG (Package Tour Directive); Richtlinie 87/102/EWG (Consumer Credit Directive) All cited *supra* note 8.

79. *Id.* Rome Convention, Article 1 provides:

> (1) The rules of this convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.
> (2) They shall not apply to:
> (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;
> (b) contractual obligations relating to: -wills and succession,—rights in proprty arising out of a matrimonial relationship—rights and duties arising out of a family relationship, parentage, marriage or affinity, including

control of contractual clauses, the limitation of liability, and the sanctions allowed under contract and damages at large. Similarly, rescission, and the setting-off of obligations are not regulated by UN International trade law. In addition, the question of whether the terms of the UN international trade law are applicable beyond the sale of goods remains unresolved.[80] Finally, the level of abstraction in the international drafts of general principles of contract law limits their utility as instruments of legal practice.[81]

B. Analysis of the Responses

The constraints of this article allow reference to only a select few of the responses made by consumers' associations, financial services providers, Governments, legal practitioners and academics to the Communication.

1. Consumers' Associations

The differences between the responses made by European Consumers' Associations are striking. While the European umbrella organization, the BEUC argues for a mix of Options III and IV,[82] the

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maintenance obligations in respect of children who are not legitimate;
(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments arise out of their negotiable character
(d) arbitration agreements and agreements on the choice of court;
(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unicorporate and the personal liability of officers and members as such for the obligations of the company or body;
(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;
(g) the constitution of trusts and the relationship between settlers, trustees and beneficiaries; (h) evidence and procedure, without prejudice to Article 14.

(3) The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law.

(4) The preceding paragraph does not apply to contracts of re-insurance.

80. *See* Remien, *Response to the Communication on European Contract Law*, *supra* note 77, at 5-6.

81. Sonnenberger H-J, *Response to the Communication on European Contract Law*, at para. II, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.22.pdf.

82. BEUC, *Response to the Communication on European Contract Law*, at p.2,

British Consumers' Association does not consider the lack of harmonization as the main cause of market fragmentation. The BEUC considers more important the language differences, foreign court costs, and the typically low value of transactions in cross-border consumer trade. The Consumers' Association argues that the Commission should have concentrated upon more modest initiatives to improve consumers' access to information, rather than focusing on harmonization. Meanwhile, the response of the ECLG (European Consumer Law Group), sets forth another view. The ECLG advocates the elaboration of EC principles of Consumer law, rather than those of Contract law. In this context, the ECLG criticizes the discrepancy between the Communication and the Commission's Green Book on Consumer Protection.[83] According to the ECLG, neither minimum harmonization, nor consumers' legitimate expectations, should be affected by any reform undertaken.[84]

2. Financial Services

Barclays Bank argues that any change to the European contract law should take the requirements of proportionality and subsidiarity seriously. The Bank observes that a harmonization in the area of B2B transactions is underway, regardless of the Communication, as the parties are free to choose the applicable law. Additionally, the Bank argues that parties who wish to enter into contracts are only rarely discouraged by legal plurality or the level of transaction costs. The Bank implies that the Communication would only help in those marginal cases, in which the parties were unsure of the commercial utility of their transactions. In the case of B2C contracts, given the restrictions on the choice of law, the Bank concludes that a fragmentation of trade may result. Not

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available *at*: http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/3.1.pdf.

83. Commission of the European Communities, *Report from the Commission: On the "Action Plan for Consumer Policy 1999-2001" and on the "General Framework for Community activities in Favour of Consumers 1999-2003"*, COM (2001) 486, at p.15, *available at:* http://europa.eu.int/eur-lex/en/com/rpt/2001/com2001_0486en01.pdf; Commission of the European Communities, *Green Paper on European Union Consumer Protection*, COM(2001) 531, *available at*: http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0531en01.pdf.

84. European Consumer Law Group, *Response to the Communication on European Contract Law*, October 15, 2001, at 3, *available at*, http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/3.3.pdf (advocates the elaboration of European Principles of Consumer law provided such principles meet three basic requirements; 1) they remain bound to minimum harmonization; 2) rely on the legitimate expectations of consumers; 3) stick to an understanding of European Consumer Law as marketing practices law).

surprisingly, the Bank would prefer that consumers be bound to the Undertaking's choice of law, rather than the consumer's place of residence. A similar conclusion is reached by the London Investment Banking Association.[85]

Barclays Bank goes on to argue for greater circumspection in the debate: while the elaboration of general principles might seem attractive, the practical difficulties of reaching consensus on the shape of legislation, seen, for example, in the controversy surrounding the *Direct Marketing of Consumer Financial Services Directive*, shows that Member States are not prepared to make the concessions necessary to achieve consensus. The same is true of the uniform application of general Contract law principles, for which the incomplete ratification of the CISG rules can be seen as a further example. Even if a contract code were to be passed, it is doubtful, according to the Bank, whether the practical application of the text would be as consensual as the Commission assumes, or whether the resulting text would meet the requirement of proportionality.[86] While an opt-in model law would ensure flexibility in the drafting of contracts, it would not necessarily lead to practical harmonization.[87] The German Federal Banking Association (Bundesverband deutscher Banken), which also argues for an opt-in solution, comes to a similar conclusion.[88]

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85. London Investment Banking Association, *Response to the Communication on European Contract Law*, at p.3, *available at*: http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/2.3.4.pdf: (contractual freedom in business with consumers is restricted by the provisions of the Rome Convention that a choice of law cannot deprive a consumer of the protection of the mandatory rules of the country where he is domiciled. This . . . is a major obstacle to the internal market).

86. Barclays Bank PLC, *Response to the Communication on European Contract Law*: http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/2.3.1.pdf: "The differences in contract law . . . result in barriers to trade. Whilst a harmonised system of contract law across the EU would be a solution to this problem, it is unlikely to be possible in practice owing to the entrenched nature of the different Member States national systems of law and the inherent differences between Common Law and codified systems." See the Commission's press release on the proposed directive: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/707|0|RAPID&lg=EN&display= .

87. *Id.* at 8.

88. German Federal Banking Association Response, *supra* note 75 (because of the traditional and diverse civil legal orders in the individual Member States the replacement of national with European norms is likely to prove a long term project. We therefore see a mid-term solution, involving a model law at European level which contracting parties in cross-border transactions could opt into as the basis for their contracts, as worthy of consideration) (my translation).

3. Governments

While the Bavarian Justice Ministry (Bayerische Staatsministerium für Justiz) focuses on the absence of community competence to initiate a broad reform,[89] the Government of the United Kingdom doubts the necessity of reform and, following a poll of industry, can find no indications that the fragmentation of contract law is in fact responsible for constructing barriers to trade.[90] The U.K. also makes it clear that consensus is required before any reform plans can be executed. Accordingly, the U.K. asserts that any reform must be proportionate, for which a concrete analysis of the effects of any reform on industry and consumers is necessary.[91] As in the response from the Consumers' Association, the U.K. underscores the 'real' sources of a lack of coherence in European Contract law. The argument that greater coherence would be produced by a horizontal approach is also viewed with skepticism. In addition, the U.K. fears that contracting parties, when faced with an EC Contract Code, may react by contracting outside of Europe altogether.[92] These opinions suggest the conclusion that, while Options I and III are to be greeted, Options II and IV are either disproportionate, or are only to be resorted to restrictively.[93] In the response of the EEA-EFTA Countries, the focal points of the reform initiative have been criticized. Those countries assert that, rather than concerning itself with theoretical questions on legal coherence, the Commission should have addressed the question of how the law would

89. *See* Bavarian Justice Ministry, *Response to the Communication on European Contract Law*, October 15, 2001, at 3, *available at* 89. *See* Bavarian Justice Ministry, *Response to the Communication on European Contract Law*, October 15, 2001, at 3, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/1.1.pdf

90. United Kingdom Government, *Response to the Communication on European Contract Law*, at 2, para. 7, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/1.4.pdf ("cross-border trade could be obstructed if different national laws . . . contained contradictory mandatory rules. No example of an existing contradiction between national mandatory rules is cited and the UK Government is not aware of any . . . considers that such problems . . . should continue to be addressed on a case-by-case basis. To adopt a horizontal approach in response to specific problems like this would necessarily breach the principles of subsidarity and proportionality.")

91. *Id.* at. p.1 ¶3: "None of the responses . . . identifies any specific problems arising from different national laws."

92. *Id.* At p.1, ¶13: 'parties outside the EU . . . who could previously have contracted under the national law of a Member State might be reluctant to contract under the harmonised EC law, opting instead for the law of a non-member State . . . (would) displace demand for legal . . . services from within to outside the EU.'

93. *See id. at* ¶¶ 18, 22, 23 und 25.

be applied in practice.[94] These countries conclude that more should be done to improve access to justice on the basis of the European Extra-Judicial Network (EEJ-Net).[95] Again, the EEA-EFTA reacts skeptically to Option IV.

4. Legal Practitioners

The UK Bar Council fears that a civil or contract code would place negotiating parties in a contracting straitjacket, which would frustrate party autonomy and jeopardize the freedom of contract. Furthermore, a contract code would reduce competition and undermine the key role played by London in the provision of cross-border legal services. Moreover, this would be incompatible with the principle of subsidiarity. Again, the Bar Council emphasizes that other factors are responsible for market fragmentation. These factors include the language barriers, the lack of consumer information, the distances between producers and consumers, or between producers. The preference expressed by the Bar Council lies with a combination of measures taken from Options I-III. In stark contrast to most other organizations, the Association of German Notaries views the Communication as an excellent opportunity to strengthen the Civil law tradition in Europe against the corrosive impact of the case-law approach. The only caveat to the German Notaries' support of any future reform surrounds its insistence on a pivotal role falling to notaries in this process.[96]

5. General Assessment

A general assessment of the responses to the tabled options can be represented in tabular form:

94. EEA-EFTA Governments, Response, *supra* note 51, at p.2. ("If consumers' rights are to have practical value, mechanisms must exist to ensure their effective exercise.")

95. Commission of the European Communities, *Commission Working Document on the Creation of a European Extra-Judicial Network*, SEC(2000) 405, *available at* http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just07_workdoc_en.pdf.

96. Association of German Notaries, *Response to the Communication on European Contract Law, available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/4.6.pdf.

Table 2: Assessment of Responses For and Against the Commission's Reform Options

Pro-Reform Arguments	Anti-Reform Arguments
Legal Plurality as a Barrier to Trade; *Pointillismus* of the classical approach to law-making; Step in securing a European identity in the Integration process;[97] Interests of SMEs and Consumers; Preventive rather than litigation-based approach; A Reduction in Transaction costs; Need for consolidation[98]-independent of the level of support from the Member States;[99] Neither market forces nor international law can supply a solution.	Competition of legal orders and the advantages of legal plurality; Necessity, Proportionality and Subsidiarity; Conflict of laws solution; A Harmonization is taking place in any case and the combination of other factors more responsible for market fragmentation; The lack of flanking measures; Option II: would take years to influence national law; Option III: a non-option rather than a solution; Option IV: neither competence nor legal base.[100]

V. The Construction of the Action Plan

In response to the Communication, and the numerous responses submitted, the Council and Parliament have developed an action plan for the future.

A. The European Council's Report

The Council's Report pursues the challenges of ensuring greater coherence and enhancing the quality of law-making. In this regard, the Council awaits the Commission's more detailed analysis of the specific EC norms, whose scope requires adjustment, and of the differences between the national legal orders responsible for market fragmentation.

97. *See* Lando & von Bar, Response, *supra* note 50, at 33.

98. *Id.* at p. 42-43 ('The effectiveness of the entire Community private law is dependent on an ability to fall back on a uniform legal terminology and to make actual use of that . . .')

99. *Id.* at p.44.

100. *Tobacco Judgment* (Case C-376/98, Germany v. Parliament and Council (Tobacco Advertising), 2000 E.C.R. I-8419, [2000] C.M.L.R. 1175 (2000)), *supra* note 3030, at ¶ 83.

As in the Communication, the Report underscores the limits to an international approach and the necessity of improving EC secondary law. As far as an international private law solution is concerned, the possibility of elaborating EC conflict principles is not even mentioned. As far as the questions of the quality and consistency of secondary law are concerned, the Council proposes development of a common terminology and an enhanced internal coordination of law-making. Moreover, the Council invites the Commission to submit proposals in order to produce a tighter coordination and transposition of the laws at the Member State level. As with the majority of the responses, the Council criticizes the limitation of the Communication to contract law. Specifically, the Council calls for an expansion of the scope of the initiative to embrace areas such as tort liability, property law, family law and the law of the free movement of persons. Finally, the Commission is charged with producing a Green or White Book detailing the future direction of the reform proposals by the end of 2002.[101]

B. The European Parliament's Resolution

Central to the Parliament's Resolution are the objectives of producing a more even-handed balance of interests between undertakings and consumers, and reducing the burden on Courts and legal practitioners. The resolution sets forth the parameters that are to be met by the Commission in executing the reform: divided into short-term, mid-term and long-term objectives.[102] The resolution sets forth that an action plan for Options II and III should be in place by 2004. From 2005 and onwards, a publication is required that highlights a comparative analysis detailing common concepts and solutions and developing a longer-term strategy for the implementation of common principles and a common terminology for cross-border and internal transactions. The Parliament indicates that reform should respect contracting parties' rights to a choice of law. According to the action plan, the effects of these new initiatives are to be assessed from 2008 onwards, allowing the passing of a common framework law from 2010 onwards.

In pursuing this ambitious course, the Parliament maintains that the European legal traditions have more in common than they are divergent.[103] Reference is made in this connection to Articles 61 and 65 EC (ex Articles 73i and 73m), which empower the Council to move towards establishing a single area of freedom, security and justice.[104]

101. Council Report, *supra* note 4.
102. *See* Resolution of the European Parliament, *supra* note 4.
103. *Id.* at Considerations C und A.
104. *Id.* at Consideration D.

The Parliament's position reflects the Commission's argument that the single market will only be achieved when consumers and SMEs begin to reap the advantages of market integration.[105] The Commission's argument that a conflicts approach is inadequate is shared in the resolution.[106]

Table 3: The European Parliament's elaboration of the Action Plan

End of 2002	**Creation of a European law Institute**, in which practitioners and representatives from academic, administrative and judicial circles elaborate general principles.
By 2004/ Option II	**Production of a Database of national contract provisions and case-law; Program of comparative legal research** to produce coherent legal terms, solutions and terminology in the areas of general contract law, sales law, the law relating to the provision of services including financial and insurance contracts, the law of non-contractual liability, the law relating to the transfer of interests and credit guarantees in movable property and the law of Trusts.
Yearly presentation	**Reports on the program of comparative legal research**; the European Parliament to respond to submitted reports.
In Parallel by 2004 /Option III	**Consolidation proposals,** for example on the simplification, coherence, expansion of scope and extent of harmonization or codification.
End of 2004	**Assessment,** whether there is a need for broader approach. For example in the area of e-commerce.
Beginning 2005	**Publication of comparative research.**
From 2005	**Integration and Promotion of comparative resrarch** within legal training.
From 2005	**Application of common terms, solutions and terminology** by all EC-Institutions
From 2006	**EC law-making on the application of common principles and terminology** for cross-border or contractual relations within Member States.
Beginning 2008	**Assessment,** how common principles and terminology have proved themselves in practice.
From 2010:	**Elaboration and passing of a framework EC Contract law**

The Parliament appears convinced that the application of EC

105. *Id.* At Considerations H und I. Articles 61 and 65 inserted (Articles 73i and 73m) by the Treaty of Amsterdam, Article 65 *Supra* FN 45; Article 61 provides: 'In order to establish progressively an area of freedom, security and justice, the Council shall adopt (c) measures in the field of judicial cooperation in civil matters as . . .'

106. *See* Resolution of the European Parliament, *supra* note 4, at Consideration J.

Contract law could be organized more coherently, and argues, as does the Council, for an expansion of the ambit of reform to questions on general formality requirements, non-contractual liability, unjust enrichment and property law. Yet the Parliament goes much further, arguing that legal coherence also requires the abandoning of minimum harmonization. This can be seen to threaten a substantial erosion of the advantages of legal plurality.[107] However, the Parliament also insists on the continued opt-in nature of any contract law that is passed.[108]

As for the problems relating to the legal base for reform, the Parliament recognizes that reliance on the Article 95 EC legal base is problematic. In this regard, the Parliament charges the Commission with testing whether the differences between instruments of EC law prejudice the achievement of a single market and whether, given the standards elaborated in *Tobacco*, the objections to Article 95 are valid.[109] With regard to the instruments to be used, the Parliament is concerned with whether a regulation, rather than a directive, should be used in the cross-border context, while maintaining that, as far as *policy-based* harmonization is concerned, the method of non-exhaustive, vertical Directives is to be kept in place.[110] Finally, the Parliament insists that any law-making that is undertaken be engaged within the cooperation procedure, ensuring the full involvement of the European Parliament.[111]

VI. New Quality in the Integration Process?

Given the positions set out by the EC institutions and respondents, the question arises whether these changes would lead to a 'new quality' of European integration. From the perspective of legal theory, the question can be phrased as one of whether a point of *Punctuated Equilibrium* has been reached.[112] It is to this question that our attention

107. *Id.* at ¶ 9: 'Regrets the fact that the Commission has surprisingly restricted its communication to private contract law, although under the terms of the mandate of the European Council of Tampere it could have broadened its scope.' ¶ 12: 'Urges the Commission to present proposals to revise the existing consumer protection directives relating to contract law in particular to remove minimal harmonization clauses which have prevented the establishment of uniform law at EU level to the detriment of the of the protection of consumers and the smooth functioning of the internal market.'

108. *Id.* at ¶ 11.

109. *Id.* at ¶ 10.

110. *Id.* ¶¶ 18; 20; and 19:

> "Takes the view that directives which are not aimed at complete harmonisation but pursue specific objectives such as consumer protection, product safety or product liability should continue to be drafted as directives which contain few detailed rules and are not based on any particular legal system so that they can readily be incorporated into the various national legal systems.'

111. Resolution of the European Parliament, *supra* note 4, at ¶ 21.

112. Mark J. Roe, *Chaos and Revolution in Law and Economics*, 109 HARV. L. REV.

now turns.

A. Chauvinism vs. Europeanism

The majority of responses are marked by either a chauvinistic or a pro-integration exuberance. These appearances frequently mask little more than personal ambition, special interest lobbying, or attempts at securing the cultural hegemony of specific national positions.[113] A more circumspect approach to the debate is called for, given that the Communication is neither a panacea nor a nightmare[114] and that a convergence in private law in Europe, if not a reality through the choice of law, is still possible.[115] Yet in view of the controversial nature of the reform options, it is striking that so few responses to the Communication were made; faced with the shift in the parameters of private law, most practitioners and theorists seem to have fallen into a state of selective amnesia.

B. Federalism vs. State Capacity

Notable in any evaluation of the responses is the divergence between those setting the role of legal harmonization in the context of a broader federal vision, and those who consider that the plans either require a more pragmatic cost/benefit analysis or need to be weighed against the real advantages of legal plurality. From this perspective, the debate can be seen as one between the supporters of federalism and those supporting enhanced State Capacity within regional organizations.[116] The idea of State Capacity can be linked to economic analysis and the advantages of legal plurality, which allow Member States 'room for maneuver' on the presumption that a competition of legal orders secures the development of more efficient solutions to legal problems than does unification or 'full' harmonization. According to this approach, the EC Treaty is a flexible framework within which Member States can search

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641, 663 (1996).

113. *See* Van Gerven Response, *supra* note 61, at pp.12-13.

114. *See* Remien Response, *supra* note 77, at p.1. Exemplifying this critical assessment: Pierre Legrand *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997).

115. *Id.* at p.11.

116. *Id.* at p.7; on state capacity see: LINDA WEISS, THE MYTH OF THE POWERLESS STATE 212 (Peter J. Katzenstein ed., Cornell University Press 1998):

> "We can expect to see more . . . of a different kind of state taking shape in the world arena, one that is reconstituting its power at the centre of alliances formed either within or outside the nation-state. For these states, building or augmenting state capacity rather than discarding it would seem to be the lesson of dynamic integration . . . the ability of nation-states to adapt . . . will continue to heighten rather than diminish national differences."

for increased efficiency through reciprocal learning.[117]

C. *The Focus on Contract Law*

While the recognition of the problems brought about through the Europeanization of private law is to be greeted, the auto-limitation of the Communication to contract law does not do justice to the broader problems caused by Europeanization.[118] This impression is strengthened when the list of secondary law, seen as relevant by the Commission in Annex 1 of the Communication, is considered. This list of the 'critical mass' of secondary law has more the character of a *potpourri* of norms and extends unpredictably beyond the strict confines of Contract.[119] Nevertheless, important areas of non-contract law, which interact with contract, such as property law, are scarcely taken into account. The Communication has thus been criticized for inadequately considering the links between the Doorstep Sales Directive (85/577/EEC), the activities of commercial agents (86/653/EEC), as well as the interaction of the property and contract law aspects of the Timeshare Directive (94/47//EC). Given the importance of advertising on the contents of contracts, a similar criticism may be made of the treatment of the directive on misleading advertising (84/450/EEC).

Though the Communication selectively exceeds the boundaries of 'pure' contract, impinging on interests in movable property, unjust

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117. Gunther Teubner, *Idiosyncratic Production Regimes: Coevolution and Legal Institutions in the Varieties of Capitalisms*, *in* JOHN ZIMAN, THE EVOLUTION OF CULTURAL ENTITIE: PROCEEDINGS OF THE BRITISH ACADEMY (Oxford University Press 2001).

118. Lando & von Bar Response, *supra* note 50, at p.18:

> "Dysfunctions do not stem entirely from the diversity of contract law. Other areas of the law of obligations and core aspects of the law of property play an equally critical role in the conclusion and performance of contracts or when transactions misfire. Like diversity in contract law, the lack of uniformity in these adjacent legal areas is a significant obstacle to the effectiveness of the internal market."

119. *See* Reich, *Response to the Communication on European Contract Law*, September 2001, p.1, *available at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/5.14.pdf Annex 1 represents:

> "a hodge-podge of Community Directives having some (not always clear) relationship to private, not necessarily contract law' '. . . Directive 2000/35 where fundamental problems of the law of obligations and securities are touched upon is mentioned under 'payment systems,' directive 2000/31 on e-commerce is put under the obvious heading 'E-commerce' without stressing its importance for contract formation. The heading of financial services lists rather haphazardly certain directives without extracting their contract law specificities . . . one wonders why such special areas like data protection, intellectual property, and public procurement are listed under the heading 'private law.' At least some explanation should be given."

enrichment, and non-contractual liability, the main focus on contract is arguably justified by the principles of subsidiarity and proportionality. Moreover, it is also the consequence of the limited EC competence to pass legislation. Additionally, the question arises as to whether a deeper impact on the content of national law would truly serve the cause of legal certainty.

The selective and uneven 'focus' on contract law is all the more problematic because contract law is divergently deliniated from other areas of law between Member States.[120] Reference in this respect is most frequently made to the common law delineation of trusts and contract, which is seen as responsible for fragmenting the market in Asset Management services across Europe.[121] Additionally, the treatment of interests in movable property is often cited as an area in which the European legal orders generate a further fragmentation, which has lead to a divergence in credit conditions and banking operations within the EC.[122] Given the interpenetration of Contract and Tort, a further argument for a broader approach is disclosed.[123] All these arguments reinforce the case that the divergent legal environments, within which contract law operates, should have found greater recognition.[124] Finally, it can be argued that important international frameworks such as the CISG rules should have played a greater role.[125]

The criticism of the scope of the Communication is pre-programmed. The lack of a legal base constitutes the crucial obstacle which any attempt at replacing vertical with horizontal harmonization or unification has to overcome. 'Amputating' selected areas of law, with the aim of subsequently harmonizing them, inevitably leads to further legal fragmentation.[126] This, in turn, can only be addressed by a progressively broader and more novel approach to EC harmonization initiatives.

D. Offending the Basic Principles of EC law?

The Commission appears convinced that it either has or will receive

120. Hans P. Mansel, *Rechtsvergleichung und europäische Rechtseinheit'* 46 JURISTENZEITUNG [JZ] 533 (1991); Uwe H. Schneider, *Europäsiche und internationale Harmonisierung des Bankvertragsrechts* [European and International Harmonization of Bank Contract Law], 44 NEUE JURISTISCHE WOCHE [NJW] 1985 (1991).

121. *See* Lando & von Bar Response, *supra* note 50, at p.20.

122. *Id.* at p.21.

123. *Id.* at 23.

124. *Id.* at 24. (". . . it must also be borne in mind that the law of contract is integrated into a seamless legal web. Its surrounding legal environment must also be brought into consideration . . .")

125. *See* Leible Response, *supra* note 57, at 17.

126. *See* Van Gerven Response *supra* note 61, at 1.

the competence to pursue harmonization or unification. With this assumption the Commission steers around a material question because, in the absence of such a competence, the treatment of the questions of subsidiarity and proportionality is premature. A strong case, however, can be made that the Commission does not have the competence to execute the proposed horizontal measure(s).[127] In this regard it is important to underscore the holding in *Tobacco*: that a divergence between national legal orders does not, of itself, provide an adequate basis for the adoption of directives; that harmonization is only allowed where the national legal norms create either real or potential barriers to European integration. This holding not only calls into question the legitimacy of existing measures of EC law, but also extends to the passing of horizontal secondary law, as well as the passing of a new instrument of EC law under Option IV.[128] Doubts regarding the competence of the Commission are particularly relevant, as the Commission appears to favor a form of cross-border harmonization.[129] On this reading, the Commission will have to wait until the next IGC (Inter-Governmental Conference) in 2004 for the introduction of a new instrument of EC law to allow a broader legislative approach.

Yet conversely, it can be argued that harmonization or even unification is necessary in terms of Articles 3h, 95(1) und 5(3) EC (ex 3h, 100a(1) and 3b(3)) in order to address the obstacles created by legal plurality because the alternatives: whether a recasting of the conflict rules; a harmonization limited to binding regulations; an abandoning of minimum harmonization; or the continued application of the *pointillistic* approach, would all be inadequate.

Harmonization, on this reading, would be covered by the principle of subsidiarity.

If this is the case then, in order to achieve a harmonization under the terms of Article 95 EC, a qualified Council majority, pursuant to Article 251 EC (ex Article 189b), would be required. However, given the opposition of a number of the Member States, it is difficult to see how such a majority could be achieved and, even if it were, it would be likely that the 'losing' parties would take legal action, under Article 230 EC (ex 173), to oppose the forced introduction of any horizontal regulation or Contract Code. As Schmid and van Gerven observe, such a controversial start to a reform project, in an area directly affecting the European Citizen's interests, would likely prove fatal to the acceptance and

127. *See* Leible Response, *supra* note 57, at 18-19.

128. *See* Schmid Response, *supra* note 56, at 5.

129. *Id.* at 5. Opinion of the European Court of Justice 1/94 WTO [1994] ECR. I-5267 ¶ 59.

legitimacy of the initiative.[130]

Given the problems relating to the Article 95 EC legal base, the question arises whether alternative legal bases would be more appropriate and whether they could secure a wider legitimacy for reform. Within the EC Treaty the possibilities are limited: Article 94 EC (ex 100) would allow, subject to unanimity, a harmonization but not a unification. Pursuing action under Article 94 would, moreover, preclude the use of Regulations.[131] Regulation(s) could only be adopted on the basis of Article 308 EC (ex 235). Yet, regardless of which of these legal bases were to be used, the question whether the parameters set in *Tobacco* had been respected would remain. Additionally, following the Nice Summit, attention has to be paid to the enhanced role of the national Parliaments. Without the involvement of national Parliaments, the legitimacy of a nascent European contract law would again be in danger.[132]

The question of the appropriate legal base indicates the difficulty of squaring the reform options with the basic principles of EC law. In addition to the problems encountered in terms of proportionality and subsidiarity, the Communication also questions the essence of the *Keck* judgment, in which the European Court of Justice held that the validity of national sales laws were not to be sacrificed in their entirety at the altar of European integration.[133]

E. The Institutional Dimension

Further problems arise at the institutional level. The first issue is whether the Commission should be reorganized due to the diversity of law-making approaches within the Directorates-General. The cautious proposal of establishing a legislative 'clearing station' inside the Commission has to be placed in the context of the political reality of Community decision-making. While the foundation of such a 'super agency,' presumably to be led by some Grand Inquisitor for coherent legislation, to oversee the work of the Directorates-General is barely conceivable, even a more modest rationalization of the Commission's

130. *Id.* at 7: "a thin legitimation by majority decision would be the worst conceivable starting position for replacing national codes by a European one.' At p.8: ". . . Although today European market law forms the legal framework for exercising private autonomy and helps it to overcome national borders, it is not rooted to a similar extent in the collective identity." *Id.* at p. 7; Community Law (is) perceived in the public consciousness more as a non-transparent botch-up by a remote supra-national bureaucracy.' *Id.* at 8.

131. Van Gerven Response, *supra* note 61, at p.23.

132. Treaty of Nice, *Declarations 13 & 14*, 154-155, *available at* http://ue.eu.int/cigdocs/de/cig2000-EN.pdf.

133. *See Keck Case, supra* note 30, at ¶¶ 16-17.

organization, as the enlargement debate has proven, would be difficult to achieve. Given these problems, alternative proposals for the institution of either a scientific committee for private law, or the institution of an advisory *European Legal Institute* have been advanced. Both of these proposals, embodying a technocratic comitology approach, have greater chances of success.[134]

Beyond the question of reforming the Commission's internal operations, or instituting new committees, the mechanism by which the application of the new EC norms could be secured demands attention. In view of the fact that the present system is in crisis, the prospect of the introduction of a contract code strengthens the case for reforming the Community's judicial infrastructure. In this regard, it can be argued that the uniform application of EC Contract law could only be guaranteed by retaining the referrals' system under Article 234 EC (ex Article 177). Additionally, as Leible argues, a court specialized in private law could be founded.[135] Further proposals include encouraging horizontal cooperation between national courts to more effectively ensure the application of both EC and conflict of laws principles.[136]

F. The Political Dimension of a Ius Commune

Federalists dream that a contract code or, ideally, a European civil code would have as integrative an effect on Europe as the legal codes have traditionally had domestically. The *BGB (German Civil Code)* in Germany and the *Code Civil* in France are frequently cited as codes that had important functions in the process of nation-building, as legal poles of identification. As Racine puts it, what Europe needs is: «*un seul droit pour une seule nation*».[137] In this regard, many of the responses disclose that the perceived function of a single law would be to safeguard the Civil law approach, an approach perceived as instituting a more preventive legal order than the Common law. This perspective explains the enthusiasm of German Notaries and the hostility of English Barristers to the Communication. Yet, the 'pro-Civil law' position is complicated when an attempt is made to secure both harmonization and the advantages of legal plurality, either through retaining minimum

134. *See* Schmid, Response, *supra* note 56; Leible S, Response, *supra* note 57, at 20-21.

135. *See* van Gerven, Response, *supra* note 61, at 24-27; *see* Leible, id., at 14-15.

136. Remien, *European Private International law, The European Community and Its Emerging Area of Freedom, Justice and Security*, 38 COMMON MKT. L. REV. 53-86 (2001).

137. *See* Racine, Response, *supra* note 64: 'a point arises at which the archaic nature of the law and its failure to adapt to new social and economic conditions causes a disruption greater than that produced by reform . . .' [Author's translation.]

harmonization, adopting an opt-in Code, or restricting EC Contract law to the cross-border context.[138] Clearly this more flexible approach raises questions as to whether the Europeanization that has taken place constitutes a 'forced coordination' of legal norms. This question can be rephrased as whether harmonization can be efficiently combined with legal plurality.[139]

VII. Alternative Options

The result-oriented and controversial nature of the reform options begs the question of alternatives. In this section, the alternatives of adopting economic, conflict and consumer protection-oriented approaches are evaluated.

A. Economic Analysis: Harmonization vs. Legal Plurality

While economic analysis can help in assessing reform options, the Commission appears not to have considered such an approach: neither the costs of the barriers to trade nor the level of transaction costs are quantified. The majority of respondents share this aversion to economics. Without producing any figures, the Commission, Parliament, and the majority of respondents assume that the obstacles to trade are significant, and that transaction costs are inflated. Only the Government of the United Kingdome and the Bar Council analyze this issue, and, while the UK cannot find parties withdrawing from transactions or markets on grounds of legal plurality, the Bar Council argues that the conclusion of cross-border contracts is proof in itself that transaction costs are not prohibitive.[140] Both these treatments are superficial; the Bar Council in particular analyzes neither the 'marginal transactions' which could be encouraged by a Code, nor quantifies a level of transaction costs which it would regard as exorbitant.

That the UK and the United States function as markets despite an internal plurality of legal orders escapes the Commission's attention.[141]

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138. *See* Furrer, Response, *supra* note 15, at 6-7.

139. *See* Teubner, *supra* note 117; *cf.* van Gerven, Response, *supra* note 61 at 12: 'that epistemological difficulties constitute unsurmountable obstacles to . . . convergence . . . is continuously contradicted by experience to the contrary of practitioners and down-to-earth academics working in European or international surroundings . . .'

140. *See* UK Government, Response, *supra* note 90; *see also* Bar Council, Response, *at* http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/4.14.pdf.

141. *See id.*, UK Government, Response, para. 14, at 3; *see generally* ZWEIGERT K & H KÖTZ, INTRODUCTION TO COMPARATIVE LAW 258 (Clarendon, Oxford, 1998): 'the US can be seen as a gigantic laboratory for legal policy in which any state can move forward . . . gain experience and reach views which enrich the debates on legal policy and

This finding, however, supports the case for a competition of legal orders as the more efficient and innovative legal order for contracts. Moreover, the reason why commercial parties in international trade are allowed a choice of law lies precisely in this enhanced efficiency. The conclusions drawn by the Commission, in the absence of debate on the advantages of the legal plurality, are premature.[142] According to economics, the best legal order for contracts is based on market forces rather than regulatory intervention: a legal order which integrates national traditions and is open for communication and learning effects.[143] Therefore, if consolidation is inevitable, the best consolidation would be one respecting these advantages.[144]

Moreover, in any economic analysis of the reform options, it has to be remembered that the costs of introducing a new instrument of EC law are not limited to one-off costs. Among the costs ignored in the debate are the costs of renouncing established national precedent and developing a new case-law independently of national traditions. Moreover, the need for case-law interpretations places policy-makers in an invidious position: while abstractly formulated law lowers the one-off costs, the costs of judicial interpretation increase. Conversely, a detailed law may raise the one-off costs, but not necessarily lead to lower interpretational costs. Additional costs are generated by institutional reform: the coordination instruments between the national courts; the regionalization of the EC courts; the creation of a new European Court of Civil law would all entail expenditure.[145] Finally, costs would arise in the reform of legal training. No studies have undertaken a comparison of the costs involved.

The lack of economic analysis discloses the paucity of the Commission's analysis. In the absence of quantification, a more skeptical response to the options is called for, especially given that proportionality is ostensibly a fundamental principle of EC law.[146] From an economic

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may serve as an encouraging or horrifying example to other states.'

142. *See* Remien, Response, *supra* note 77, at 6: 'Before any expansion of European legal norms (can proceed) . . . it must be ensured that common rules in legislation lead to a uniform legal application' [Author's translation.]

143. *See* Leible, Response, *supra* note 57, at 17; Reich N., Response *supra* note 119, at 4.

144. *Id.* at 10: 'the institutional conditions must be shaped so that . . . the real advantages of legal plurality are not lost and learning effects are still possible.' [Author's translation.]

145. Weiler J.H.H. & J.P. Jacqué, *On the Road to EU: A New Judicial Architecture*, 27 COMMON MKT.L.REV. 185 (1990).

146. *See* Remien, Response, *supra* note 77, at 3: 'Whether . . . the cause of the Single Market will be significantly advanced, whether the Europeanization of day-to-day legal problems will not bring about higher costs and lead to further problems and whether an allocation of general legal policy to the central European level, rather than Member State

standpoint, the case for harmonization is not as compelling as the Commission suggests.

B. The Multi-level System and European Conflict Rules

A second alternative to the reform proposals is a conflict of laws approach. Again, this approach is notable for its absence in the Communication and the majority of responses to it. Nevertheless, the case can be made that such an approach is required, regardless of any harmonization initiatives, because national law will continue to play a significant role independent of the constellation of options from which the reform of EC contract is finally drawn. As Sonnenberger revealingly observes, a harmonization of cross-border transactions would, for example, only add another level to the multi-level system.[147] Furrer goes on to observe that the continued validity of the multi-level system will require instruments to attribute norms to the specific levels and to determine their relative importance within the network; a recasting of conflict rules, building upon the traditional international private law approach, needs to be incorporated into the reform options.[148]

In constructing a *European Law of Conflicts*, the observation that the application of national or EC norms is dependent of their contextual interpretation is vital. Given the Treaty framework, reference needs to be made to either an obstacle to trade, identifiable through a transnational component in the dispute, or through the achievement of a policy goal as enumerated in the Treaty: Consumer Protection, SME policy, Environmental or Social policy.[149] In the application of EC law addressing obstacles to trade, a *juggling of norms,* or a balancing of opposing national and EC norms, applies. The juggling of norms means, that while EC norms on free movement may, for example, play the crucial role and suppress the application of opposing national law, they may, in contrast, be interpreted in the light of public interests, as they are

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level, is advisable remain open questions. A comprehensive harmonization of Private or Contract law can only be viewed as a possible option for the longer term, not as a realistic program. That the Single Market requires a unification of Contract law has been suggested but has not been proven.' [Author's translation.]

147. *See* Sonnenberger, *supra* note 81, Point V: 'It would be unfortunate if a dual-track conception of European Contract law were to establish itself.' (my translation).

148. *Id.*, Point. IV: 'The elaboration of a uniform law of Conflicts in Contract law could be based on the Rome Convention and take the form of a regulation and integrate, develop and modernize the approach taken in directives, though purged of their inadequacies. A modern EC regulation on the law applicable to contracts would have the great advantage of dealing with the lack of clarity and legal certainty in contract terms caused by the divergent treatment of contracts in the Member States.' [Author's translation.]

149. *See* Furrer, Response, *supra* note 15, at 13-14.

respected in the Treaty, for example in Article 86(2) EC (ex 90(2)), allowing national law to be upheld against opposing EC norms.[150] This contextual, rather than hierarchical interplay of norms, must be reflected in a European conflict approach.

To coordinate the multi-level system in this sense, to secure the coherence of the norms involved, and to safeguard the intent of the legislator(s), a matrix of norms and an analytical checklist have to be established. A model for this approach is supplied in Furrer's *Principles of a European Law of Conflicts* and involves four analytical steps:

I. The Preliminary Examination: As a first step, in a given dispute, a preliminary examination discloses the directly or indirectly relevant international, EC-international, EC and national norms and their respective places in the multi-level system. The collection of these norms initially takes place without regard to the national validity, direct applicability, or the national hierarchy of norms. The assignment of the norms to their specific levels in the system follows on the basis of the identification of the legislator, the court of last instance, and a contextual analysis of the specific norm. Additional national norms relevant to the dispute, such as national mandatory requirements, are disclosed on the basis of a *lex fori* conflicts' analysis. The norms so identified are interpreted in their respective legal contexts. The systematic, teleological and functional inter-relationships of the multi-level norms are not relevant at this stage of analysis.[151]

II. Demarcation and Coordination of National Norms: The second step of analysis involves a demarcation and coordination of the relevant national norms compatible with the overarching market integration imperative of EC law.

The easiest case is where the national norm is laid down by an EC Regulation or a directly applicable directive and is applicable independently of national conflict rules;

A second proposition allows the application of the law of the country of origin where this is compatible with the free movement provisions in the EC Treaty;

The third proposition involves consideration of national mandatory requirements as they indicate either the applicability of the more stringent law of the country of origin or the recipient state. The law of the country of origin may be displaced by the more stringent law of the recipient state where:

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150. *Cf.* Centros v Erhvers-Og Selskabsstyrelsen, Case C-212/97, 1999 E.C.R. I-1459 *and* Deutsche Post AG v GZS Gesellschaft für Zahlungssysteme, Citicorp Kartenservice GmbH, Joined Cases C147 and 148/97, 2000 E.C.R. I-825 on the reciprocal boundaries of private autonomy and Community interests.

151. *See* Furrer, Response, *supra* note 15, at 24-25; Furrer, *supra* note 16, at 503-504

a) – the conflicts' analysis, conducted in the preliminary examination, has indicated the applicability of that law and where this is compatible with EC law or;

b) – where the law of the country of origin is not to be applied because on a literal interpretation of the norms, from a comprehensive assessment of their development, their general context as well as their inherent goals an intent to apply them does not emerge[152] or;

c) – because of their incompatibility with the requirements of Community law.

Additionally the more stringent law of the recipient state can be applied when:

a) – the interests of the offeror are pre-eminent,

b) – where an intent to apply the law of the country of origin does not emerge from a contextual analysis, and

c) – when the law of the country of origin is not compatible with EC law.[153]

III. Vertical Assignment: vertical assignment is required to regulate the relationship of non-national norms to national norms applicable under the preceding analysis. Non-national norms are applicable where they have national validity, are directly applicable, and have precedence over national mandatory requirements. They are not to be applied, recalling the norm juggling previously analyzed, where: on a literal interpretation of the norms, from a comprehensive assessment of their development, their general context as well as their inherent goals, an intent to apply them does not emerge. In this stage of analysis, the validity, direct applicability, and precedence of non-national norms is interpreted in the light of the national mandatory requirements and the applicable international instrument(s). The validity, direct applicability and precedence of the EC norms are interpreted in the light of the fundamental principles of EC law.

1. Caveat: vertical assignment and national mandatory requirements: the applicable norms identified are measured against the requirements of the applicable legal level so long as this involves either a fundamental freedom guaranteed by EC law, the common constitutional traditions of the Member States or the European Human Rights Convention. Finally, national-mandatory requirements are to be applied notwithstanding the validity, applicability and precedence of countervailing norms of EC law, where the national measures safeguard the EC mandatory requirements. This proposition is asserted in the

152. *Id.*at 27, 505.
153. *Id.* at 25-26, 504-505.

Treaty and developed by the European Court of Justice,[154] and where those national measures respect the fundamental principles of EC law, in particular the principle of proportionality, and provided that the Community has not passed secondary legislation protecting the same objectives as the national measures.

2. Caveat: vertical assignment, full harmonization and upward derogation: the national mandatory requirements are applicable, notwithstanding EC secondary law protecting the same objectives where the EC secondary law does not provide for full harmonization;[155] the Community has not 'occupied the field'; the national measure does not compromise the achievement of EC objectives; where the national law-maker refers to the EC mandatory requirements in passing the national measure; or where upward derogation is allowed under Article 95(4).[156]

IV. Securing Full Implementation of the Multi-level norm in the National Context: the applicable norms emerging through the application of the principles developed in this matrix are integrated into the approach taken to questions of national law superficially not addressed by the International, EC-International and EC norms, in order to secure a coherent and full application of the laws of the multi-level system.

C. Adopting or Rejecting a Pro-Consumer Approach?

The third alternative to the reform options is to adopt a more consumer-oriented approach. In this regard the question set by Wilhelmsson, as to the values pursued by the Commission and the character of the law which would emerge, illuminates the discussion. Wilhelmsson's question can be rephrased in a number of ways: is a trend towards a conservative, industry-friendly law, as a retreat from

154. On EC Mandatory Requirements developed by the European Court of Justice see *Cassis de Dijon,* Case 120/78, *supra n.13*: For EC mandatory requirements see: Article 30 EC (ex Article 36) *supra n.*13; Article 39(4) EC (ex Article 48) which secures derogation from the free movement of persons for 'employment in the public service.' Article 45 EC (ex Article 55) on rights of establishment which provides derogation for 'activities which in that (Member) State are connected with the exercise of public authority.'

155. Full harmonization: *Criminal Proceedings against Karl Prantl,* Case 16/83, 1984 E.C.R. 1299 para. 13: 'once rules on the common organization of the market may be regarded as forming a complete system... the Member States no longer have competence in that field unless Community law expressly provides otherwise.'

156. Article 95(4) EC (ex 100a(4)) provides: 'If after the adoption by the Council or by the Commission of a harmonization measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of the provisions as well as the grounds for maintaining them.'

regulatory law, discernible in the Communication;[157] or can the Communication be seen in terms a response to the need for greater flexibility?[158] In Leible's view, the Communication holds the promise of ensuring a re-evaluation of the outdated priorities of EC law; as an opportunity to combat the 'exaggerated' level of consumer protection traditionally adopted by the EC.[159] To Leible, an important indicator of this trend lies in the fact that a full transposition of the detail of EC secondary law into a Contract Code or regulation would not be possible.[160] The question can also be stated to ask whether a formally lower, though uniform, level of protection can in fact enhance the effectiveness and transparency of consumers' rights. Clearly, whether lower standards really dilute consumer protection, reveals the complexity of analysis on the consumer friendliness of the Communication.

To Lurger, however, what can be said is that this question has not been adequately dealt with in the debate so far. While ordoliberals, distrusting consumer protection in particular and regulatory law in general, see places in the reform for deregulating the European market, Lurger argues that law-makers have to ensure wider *contractual solidarity* through the material penetration of contracts' provisions in order to maintain consumer confidence. This could be illustrated, for example, by instituting standards on the duty to inform, or advertising or sales practices' regulation. While in this manner the exploitation of weaker parties can be precluded and a redistributive effect can be achieved, a wider point is that the whole Single Market program depends on consumer confidence in transactions in an integrated market.[161] Exemplification of the counterproductive nature of the ordoliberal understanding of the regulatory function of contract norms can be seen in the judgment in *Dietzinger*: a law of contract which is not concerned with fairness undermines the resort to contracts in general.[162]

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157. *See* Wilhelmsson, *supra* note 65, at 84: 'the idea requires commitment to traditional . . . values.'

158. On the neo-liberal function of EC law *see* WARD I., A CRITICAL INTRODUCTION TO EUROPEAN LAW 13 (Butterworths, London, 1996); a more optimistic position: Ladeur K.H., *Methodendiskussion und Gesellschaftlicher Wandel*, 64 RABELSZEITSCHRIFT [RABELSZ] 60 (2000).

159. *See* Leible, Response, *supra* note 57, at 13-14: 'The possibility to banish the selective exaggeration of Community consumer protection law . . .' [Author's translation.]

160. *Id.* at 17.

161. *See* Lurger, *supra* note 2: 'Because the State does not want to advance the exploitation of individuals it requires fairness and contractual solidarity. Unlimited freedom of Contract would allow the powerful parties to realign the redistribution of resources away from the weaker contracting party.' [Author's translation.]

162. Case C-45/96 *Bayerische Hypotheken- und Wechselbank v Edgar Dietzinger* [1998] ECR I-1199.

VIII. Conclusions: The Future of the Europeanized, Globalized Contract

The impression made by the Commission is that it is not content with modest or pragmatic approaches. The Commission clearly perceives itself as being under pressure to deliver major reform, an observation that can be extended beyond the field of Contract law. In its reformist zeal, the Commission announces a new quality to the integration process and undermines understanding of the fundamental principles of EC law. Without an economic analysis of the options, without a full evaluation of the flanking measures, and without a convincing analysis of the legal base requirements, it would appear that today it is the Commission, rather than the Court of Justice, which is 'running wild.'

The fact that the collection of result-oriented options presented by the Commission has met with such broad support, both institutionally and in the majority of responses, indicates that the project will eventually be implemented. However, it is also clear that the need to achieve some form of consensus, in Council and with the European Parliament, will mean that any reform emerging from this process will be a compromise: the future will be shaped by a mixture taken from Options II to IV. In the near future, the first two steps appear relatively clear: the first step is in the area of improving the quality of secondary law with at least an initial focus on the consolidation of the provisions of consumer protection; the second step is the elaboration of a Restatement of the European law of Contract, which could be produced by a European Law Institute, yet to be established by the Commission.

The criticisms that are charted in this paper, the limits of the reform options, as well as the suspicion that the terms of debate have been orchestrated remain. These criticisms must be addressed, and before consensus can be achieved answers have to be found concerning the question of the legal base as well as the subsidiarity and proportionality of any reform. Similarly, answers must be provided on the flanking measures necessary to complement the reforms. Simultaneously, however, attempt should be made to escape the shackles of the current debate and engage in a more comprehensive discussion. In this regard, this analysis has indicated a number of alternative approaches; alternatives which need to be integrated into the debate. The alternatives disclosed in this analysis focus on the need for a conflicts approach; the need to reconsider the scope of the harmonization; the utility of economic analysis; and the general character of Contract law:

A European Law of Conflicts: the paucity of the Commission's approach is disclosed in the suppression of debate on a conflicts approach as a complementary instrument for the coordination of the

multi-level system. Such an approach holds the promise of stemming further fragmentation in European private law. Moreover, a European law of conflicts is required regardless of the mixture of reform options which is finally selected. Without such an approach, further fragmentation and divergent treatment within European private law is inevitable.

The Scope of Reform: the scope of reform deserves greater reflection. Whilst the limitation of reform to 'pure' contract or to consumer law would produce further fragmentation, any expansion of the scope of reform to, for example, tort, property law and trusts, would tend to overload the project. Were an EC Contract Code, limited to cross-border transactions, to emerge at the end of the exercise, gaps would almost immediately begin to emerge in the legal framework, which would again question the proportionality of the exercise. While such a 15 +1 system would have the advantage of being compatible with the competition of legal orders, it would tend to increase rather than decrease transaction costs.

- **The Economics of Reform:** it is important to underscore that the quantification question is neither easy nor unequivocally answered: both the auto-limitation of the project as well as an extension of its scope would produce high direct and indirect costs. The only certainties appear to be that harmonization without a parallel elaboration of conflict principles will not significantly reduce costs; and that these costs are not limited to one-off costs.
- **Consumer Confidence:** reflection of the character of the nascent law, going beyond a simple realignment of an 'exaggerated' consumer-oriented approach, are needed in order to produce a law which truly reflects consumers' and SMEs' interests. While these considerations have been inadequately reflected in the debate so far it is clear that without consumer confidence true market integration will be frustrated.

Aside from these observations on the direction of developments, the identification of the pitfalls of reform, and the identification of considerations which need to be integrated into debate, there is a broader message behind the reform initiative with global implications and addressed at regional and global policy-makers. The model character of the EC makes the new focus on the effects of international and regional law on national law, and the specific penetration of Private law, all the more intriguing. The picture drawn in this analysis confirms the increasing obsolescence of the nation state in the global trading environment, and the difficulties brought about by the confrontation with a new porous legality of multiple norms. This picture underscores the need for increasing regional and global initiatives, and the need to construct matrices of regional conflict principles to deal with the

problems in coordinating legal plurality. This development is of more than theoretical interest, as regional conflict law aims to resolve the increasingly complex practical problems in cross-border disputes. Finally, the chameleon-like character of the implications of the advent of the polycentric multi-level system deserves special emphasis: while increasing regionalization is superficially erosive of national sovereignty, this analysis has shown that the process can also work to enhance state capacity. Similarly, harmonization should not be mistaken as announcing a neo-liberal agenda, formally lower yet uniform standards can work to enhance, rather than dilute, levels of consumer protection.